Supreme Court, U.S.
FILED

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No. 00-

IN THE

Supreme Court of the United States

TOWN OF NORWOOD, MASSACHUSETTS,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

PETITION FOR A WRIT OF CERTIORARI

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December 22, 2000

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

60 pp

QUESTION PRESENTED

Whether, under the Federal Power Act and the filed rate doctrine, the Federal Energy Regulatory Commission may enforce an unfiled change to a contract which "affect[s] or relate[s] to" rates and charges for electrical service on the ground that the filed contract states that one of the parties may make such a change at its option. 16 U.S.C. § 824d(c).

PARTIES TO THE PROCEEDING

The only parties in the proceeding are the petitioner and respondent listed in the caption. The only other party in the proceeding below was intervenor New England Power Company.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Town of Norwood, Massachusetts ("Norwood"), respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-13a) was entered on June 29, 2000 and is reported at 217 F.3d 24 (1st Cir. 2000). The order denying the petition for rehearing and rehearing *en banc* (App. 24a-25a) was entered on August 25, 2000, and is not reported. The order of the Federal Energy Regulatory Commission ("FERC" or "Commission") (App. 14a-23a) was issued on June 21, 1999, and is reported at 87 F.E.R.C. ¶ 61,341 (1999).

JURISDICTION

The opinion and final judgment of the court of appeals were entered on June 29, 2000. The court of appeals denied Norwood's petition for rehearing and suggestion for rehearing *en banc* on August 25, 2000. On November 13, 2000, Norwood filed a timely application for extension of time to file the petition for certiorari in this case; Justice Souter granted the application and allowed Norwood until December 22, 2000 to file the petition. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The relevant provisions of the Federal Power Act, 16 U.S.C. §§ 824d(a), (c)-(d), and 825*l*(b), are reprinted in App. 26a-28a. The pertinent regulations, 18 C.F.R. §§ 35.1, 35.13(a), (c), are reprinted in App. 29a-36a.

STATEMENT OF THE CASE

A. Statutory And Regulatory Background

Congress, in enacting the Federal Power Act, required that rates and charges for transmission or sale of electric service under FERC's jurisdiction must be "just and reasonable," and authorized FERC to issue regulations implementing this requirement. 16 U.S.C. § 824d(a). In addition, so that FERC can carry out its statutory obligation to ensure that such rates and charges are "just and reasonable," Congress required electric utilities to file with FERC schedules showing the rates and charges for transmission or sale of electric service, as well as any classifications, practices, regulations, and contracts affecting the rates and charges, *id.* § 824d(c). Congress further mandated that, subject to waiver for good cause, "no change shall be made by any public utility in any such rate, charge, classification, or service, or in any rule,

regulation, or contract relating thereto, except after sixty days' notice to the Commission and to the public." *Id.* § 824d(d).[1]

B. Statement Of Facts

The Town of Norwood, Massachusetts, operates a municipal electric company that distributes retail power to residents and businesses in the town. Although Norwood had been a long time purchaser of power from Boston Edison Company, pursuant to a 1983 consent decree, Norwood and New England Power Company ("NEPCO") entered into an all-requirements contract ("1983 Contract"). Under that contract, NEPCO agreed to supply, and Norwood agreed to accept, sufficient power to satisfy Norwood's needs for electricity through October 31, 1998, under the terms of NEPCO's FERC Tariff No. 1 "'as [it] may be amended from time to time.'" App. 2a (alteration in original). The 1983 Contract specified a termination date of October 31, 1998, and further stated that neither NEPCO nor Norwood could give notice of termination prior to November 1, 1991, or specify a termination date prior to November 1, 1998.

In 1987, Norwood and NEPCO amended the 1983 Contract ("1987 Amendment") to permit Norwood at its option to receive all of its power requirements from NEPCO, including any then available lower-cost power from the New York

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[1] FERC has adopted regulations that, in accord with § 824d, require the filing of any "rate schedule . . . which proposes to supersede, supplement, cancel or otherwise change any of the provisions of a rate schedule required to be on file with this Commission" and which prohibit utilities from "impos[ing] any classification, practice, rule, regulation or contract with respect [to electric service], which is different from that provided in a rate schedule required to be on file with this Commission." 18 C.F.R. § 35.1(c), (e). FERC issued a rule in 1993 requiring all public utilities to have on file, by December 31, 1993, "*all agreements* under which they [have] provided jurisdictional service as of August 2, 1991." *Prior Notice and Filing Requirements*, 64 FERC ¶ 61,139 at 61,978-79 (emphasis added), *modified*, 65 FERC ¶ 61,081 (1993).

Power Authority, effective November 1, 1998. The amendment further stated that "'[w]ritten notice of intent to exercise this option must be provided by Norwood on or before November 1, 1997.'" App. 15a (alteration in original). NEPCO duly filed this Amendment of the Tariff with FERC. Norwood, however, never exercised the option from the 1987 Amendment.

In 1989, Norwood and NEPCO again amended the 1983 Contract ("1989 Amendment") to state that Norwood:

> may elect to extend the earliest date by which either party can give notice of intent to terminate service by a total of 20 years in two ten-year increments. In order to exercise this election, Norwood agrees to provide [NEPCO] with written notice of each such election at least one year prior to the date that it is to be extended, viz. to November 1, 2001 initially and to November 1, 2011 ultimately. [App. 15a-16a (alteration in orginal).]

Again, NEPCO filed the Amendment with FERC, which accepted it in an unpublished letter-order.

On July 25, 1990, Norwood sent a letter to NEPCO ("1990 Letter") in which it gave NEPCO:

> "notice . . . that it extends the date by which either [NEPCO] or Norwood could give notice of intent to terminate service from the present date of November 1, 1991, contained in the [1983 Contract] to November 1, 2001. The effect of this is that the Power Contract between [NEPCO] and Norwood would be extended for 10 years to midnight, October 31, 2008 (Article III, Paragraph A)." [App. 16a (first and third alterations in original).]

The 1990 Letter, stated that notice was being given pursuant to the 1983 Contract, as amended by the 1989 Amendment. NEPCO neither acknowledged nor filed the 1990 Letter with FERC.

In December 1996, NEPCO made a number of filings with FERC in order to restructure itself and to sell its non-nuclear plants, which were lower cost than its nuclear plants. Between November 1997 and June 1998, FERC (over Norwood's objections) approved the sale of the non-nuclear plants, the restructuring of NEPCO's wholesale rates, and a "rate freeze" for NEPCO's existing charges with wholesale contract purchasers, including Norwood. On March 4, 1998, Norwood, in light of these developments, notified NEPCO that it was switching to another wholesale supplier, Northeast Utilities. A tariff and agreement between Norwood and Northeast Utilities were filed with FERC and have gone into effect.

In response to Norwood's notification of termination, NEPCO filed a revised FERC Tariff No. 1 that permitted Tariff No. 1 customers, including Norwood, to terminate their contracts early with 30 days' notice – but required such customers to pay a contract termination charge ("CTC"), equaling NEPCO's expected gross profits (revenues minus avoided costs) through the earliest date that the customer could have terminated service under its contract. Over Norwood's objections, FERC approved the amendment to NEPCO's Tariff No. 1 and authorized the contract termination charge. As a result, a CTC of approximately $ 78 million was imposed on Norwood.

Norwood then filed with FERC a petition challenging the application of the CTC to it. Norwood argued that application of the CTC after October 31, 1998 violated the filed rate doctrine, the *Mobile-Sierra* doctrine,[2] and FERC's *Prior Notice and Filing Requirements*, 64 FERC ¶ 61,139, *modified*, 65 FERC ¶ 61,081 (1993), and § 205(c) and (d) of the Federal Power Act. Specifically, Norwood showed that the CTC could not be applied to it after October 31, 1998,

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[2] *See United Gas Pipe Line Co.* v. *Mobile Gas Serv. Corp.*, 350 U.S. 332 (1956); *FPC* v. *Sierra Pac. Power Co.*, 350 U.S. 348 (1956).

because the 1983 Contract terminated on that date and had not been effectively extended as a matter of law. FERC denied the petition on the ground that the 1990 Letter, in fact, "extended the term of the contract" to October 31, 2008. See App. 21a. In reaching this conclusion, FERC stated "that whether the July 25, 1990 letter was filed with the Commission is irrelevant to the issue of whether that letter constitutes a binding agreement by Norwood to extend the term of the contract." See *id.* at 22a. Additionally, FERC rejected petitioner's filed rate doctrine by concluding that the 1990 Letter, notwithstanding the fact that it purported to extend the contract term, was not required to be filed because it was the "exercise of a preapproved option." See *id.* Norwood filed a timely petition for review of that order to the Court of Appeals for the First Circuit pursuant to 16 U.S.C. § 825*l*(b).

C. Decision Of The Court Of Appeals

The First Circuit denied the petition for review. The First Circuit accepted FERC's decision that the 1990 Letter extended the 1983 Contract. App. 5a.[3] Then, critically here, the First Circuit affirmed FERC's decision that it could enforce the 1990 Letter despite the fact that it was never filed with FERC. In so doing, the First Circuit refused to apply either the filed rate doctrine or the statutory and regulatory provisions that require the filing of any contract which affects electrical rates and services. *Id.* at 7a-11a.

Specifically, the court of appeals recognized that both the Federal Power Act and FERC's regulations implementing that Act require the filing with FERC of "all contracts which in any manner affect or relate to [rates and charges for any transmission or sale subject to the jurisdiction of the Commission]." 16 U.S.C. § 824d(c). App. 7a. But, the court said,

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[3] Although Norwood challenged FERC's construction of the 1990 Letter in the First Circuit under the *Mobile-Sierra* doctrine, and on the ground that FERC has no authority to construe unfiled contract documents, Norwood does not seek review of those holdings in this Court.

FERC had held that the 1990 Letter was not a "contract": "The gist of the Commission's holding is that the *contract* was what was set forth in the 1983 contract and the 1989 amendment, both of which were filed with the Commission; the letter merely exercised an election already spelled out in those filings." *Id.* at 9a. Without considering the uniform law that a decision to exercise an option in a contract creates a new contract, the First Circuit instead said that the term "contract" in the Federal Power Act is ambiguous; the 1990 letter "is not itself a contract in common usage"; and therefore that FERC had the power to construe the statutory requirement that all contracts be filed "*not* to encompass a notice of election already provided for by a duly filed contract" under the *Chevron* doctrine. *Id.* (citing *Chevron, U.S.A., Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-45 (1984)).

As a result, the First Circuit decided that FERC's enforcement of the 1990 Letter did not violate the filed rate doctrine, despite the fact that the Letter altered the contract between the utility and its customer. The court cited *Arkansas Louisiana Gas Co.* v. *Hall*, 453 U.S. 571 (1981), where this Court held that FERC should enforce the rate in a filed agreement, *not* a different rate based on a "favored nations" clause in a filed agreement, even though the conditions stated in the "favored nations" clause of the filed agreement had arguably been met. But the First Circuit purported to distinguish this case on the ground that "it was unclear whether FERC would have accepted the higher rate resulting from the favored nations clause" and that "the contract did not constitute pre-approval of any rate generated by the favored nations clause." App. 10a. The court acknowledged that "[n]eedless to say, without the filing of [the 1990 Letter], no outsider could visit the Commission's files and determine whether the election to extend had been exercised. This provides whatever policy argument there might be for a broad interpretation of 'contracts' in the statute." *Id.* Nonetheless,

the court found that "this is the kind of grey area . . . in which great weight must be given to the Commission's judgment." *Id.*

The court thus allowed enforcement of the extension of the contract and held that the CTC could be applied to Norwood through October 31, 2008. App. at 6a, 10a-11a.

REASONS FOR GRANTING THE PETITION

This case presents important questions of federal law regarding the application of the filed rate doctrine. The First Circuit's holding is in substantial tension with this Court's decisions in *Arkansas Louisiana Gas Co.* v. *Hall*, 453 U.S. 571, 578-79 (1981) ("*Arkla*") and *AT&T Co.* v. *Central Office Telephone, Inc.*, 524 U.S. 214, 224-26 (1998) (*Central Office Telephone*"), and with established authority requiring public utilities to file with FERC when parties exercise options in filed contracts that affect rates. Equally critically, the court of appeals' decision, if it stands, will substantially weaken the filed rate doctrine, causing serious injury to the principles underlying it and to the customers that the doctrine serves to protect "across the spectrum of regulated utilities." *Arkla*, 453 U.S. at 577.

I. THE COURT OF APPEALS' HOLDING IS IN SUBSTANTIAL TENSION WITH *ARKLA* AND *CENTRAL OFFICE TELEPHONE.*

In this case, the court of appeals held that a decision to exercise an option under a contract filed with FERC was not itself a contract which "in any manner affect[s] or relate[s] to . . . rates, charges, classifications, and services." 16 U.S.C. § 824d(c). The court believed that the filed rate doctrine did not apply because the exercise of an option "is not itself a contract in common usage," App. 9a, and because the provision extending the contract did not affect or relate to the rates, charges, classifications and services covered by the tariff, *id.* at 8a-10a. This decision cannot be squared with this

Court's teachings in *Arkla* and *Central Office Telephone*, or with established case authority holding that parties exercising options under filed rate contracts must also file amendments to their contracts with FERC.

Under the Federal Power Act, public utilities, including NEPCO, must file with FERC:

> schedules showing all rates and charges for any transmission or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with *all contracts* which in any manner affect or relate to such rates, charges, classifications, and services. [16 U.S.C. § 824d(c) (emphasis supplied).]

The Act further requires that any change in a rate or contract be filed with FERC. *Id.* § 824d(d). FERC's regulations make clear that a utility may not enforce an unfiled rate or contract. 18 C.F.R. § 35.1(e). And, indeed, FERC's regulations define "rate schedule" to include not only rates, but "all classifications, practices, rules, regulations or *contracts which in any manner affect or relate to the aforementioned service, rates, and charges.*" *Id.* § 35.2(b) (emphasis supplied).

The critical importance of these statutory requirements has been highlighted and strengthened by a line of cases, construing statutes such as the Federal Power Act, the Natural Gas Act, and the Communications Act and establishing the so-called filed rate doctrine. The fundamental rule of the filed rate doctrine is that "'the rate of the carrier duly filed is the only lawful charge. Deviation from it is not permitted upon any pretext.'" *Central Office Telephone*, 524 U.S. at 222. See also *Arkla*, 453 U.S. at 578 (under the filed rate doctrine "[n]ot only do the courts lack authority to impose a different

rate than the one approved by the Commission, but the Commission itself has no power to alter a rate retroactively").[4]

The court of appeals' decision that FERC could enforce Norwood's exercise of its option to extend its contract with NEPCO despite NEPCO's failure to file that extension is flatly inconsistent with the filed rate doctrine. When a filed contract contains an option that may or may not be exercised, a party's decision to exercise that option creates a contract and must be filed or it cannot be enforced. The court of appeals' statement that the exercise of an option "is not itself a contract in common usage," App. 9a, is flatly wrong. See *Restatement (Second) of Contracts* § 25 (1981) ("[a]n option contract is a promise which meets the requirements for formation of a contract and limits the promisor's power to revoke an offer"); 3 Eric M. Holmes, *Corbin on Contracts* § 11.8, at 515 (rev. ed. 1996) ("[a]lthough an option contract is itself binding (that is, it is a contract before the option holder makes a choice and exercises the power) nevertheless, the exercise of the power changes the legal relations of the parties") (footnote omitted); John D. Calamari & Joseph M. Perillo, *Contracts* § 2-25, at 125 (3d ed. 1987) ("in the case of an irrevocable offer the weight of authority is that the acceptance is operative when received by the offeror"). And, the court's consequent refusal to treat the exercise of the option as a contract that had to be filed is contrary to this Court's decision in *Arkla*.

In *Arkla*, Hall and other producers of natural gas ("Hall") filed with FERC a contract with Arkla, setting rates for natural gas produced from the Sligo Gas Field. That contract included a favored nations clause providing that if Arkla paid higher prices for Sligo gas from another producer, then Hall, too, would be entitled to the higher price. Subsequently, Hall

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[4] National Gas Act cases, like *Arkla*, and Federal Power Act cases are cited interchangeably in light of the substantial similarity between the two statutes. *See Arkla*, 453 U.S. at 577 n.7.

believed that Arkla's purchase of certain leases in the Sligo Field and production of gas there triggered its obligation to pay Hall higher rates, and Hall sued Arkla for breach of contract in state court and received an order for damages under the favored nations clause.

This Court reversed, holding that the filed rate doctrine precluded an award of damages based on the favored nations clause. Specifically, the Court recognized that the favored nations clause was in the agreement and provided for a rate increase should certain conditions develop, but the Court nonetheless refused to enforce the higher prices required under the clause because they had not been filed with FERC: "Respondents' theory of the case would give inordinate importance to the role of contracts between buyers and sellers in the federal scheme for regulating the sale of natural gas." 453 U.S. at 582.[5]

That analysis is directly applicable here. The filed contract gave Norwood an option to extend the length of its contract, but "without the filing of the [1990 Letter], no outsider could visit the Commission's files and determine whether the election to extend had been exercised." App. 10a. The filed rate doctrine thus requires the filing of Norwood's exercise of its option to extend with FERC. Indeed, there is a long and well established line of authority holding that when a filed contract contains either "most favored nations" or price escalation provisions, changes pursuant to such provisions must be filed in order to be enforced. See, *e.g.*, *Cities Serv. Gas Prod. Co.* v. *FPC*, 233 F.2d 726, 730-31 (10th Cir. 1956) (refusing to enforce producer's letter adjusting prices

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[5] The First Circuit weakly attempted to distinguish *Arkla* by observing that there it was "unclear whether FERC would have accepted the higher rate resulting from the favored nations clause." App. 10a. FERC may always disapprove a contract change on the grounds that it is not in the public interest, however, *see* 16 U.S.C. § 824d(e), and third parties could have challenged, and FERC could have disapproved, the extension of NEPCO's contract with Norwood on that basis.

pursuant to contractual provision contemplating such adjustments because it had not been filed with the Commission). Accord *Episcopal Theological Sem'y* v. *FPC*, 269 F.2d 228, 233-34 (D.C. Cir. 1960); *Phillips Petroleum Co.* v. *FPC*, 258 F.2d 906, 917 (10th Cir. 1958) (refusing to enforce producer's billing pursuant to contractual provision contemplating price increases premised on royalty rates); *Mississippi Power & Light Co.* v. *Memphis Natural Gas Co.*, 162 F.2d 388, 390 (5th Cir. 1947).[6] These cases are consistent with this Court's admonition that a federally regulated utility "can claim no rate as a legal right that is other than the filed rate, whether fixed or merely accepted by the Commission, and not even a court can authorize commerce in the commodity on other terms." *Montana-Dakota Utils. Co.* v. *Northwestern Pub. Serv. Co.*, 341 U.S. 246, 251 (1951).

The real basis for the court of appeals' holding appears to be that the option at issue deals with contract length rather than rates, and the court chose not to hold the utility to the punctilio of the filed rate doctrine in this area. The law, however, does not allow courts to elevate the importance of rates and reduce other matters relating to rates to second-class status: It defines "rate schedule" to include not only rates, but "all classifications, practices, rules, regulations or contracts which *in any manner affect or relate to*" rates. 18 C.F.R. § 35.2(b) (emphasis supplied); 16 U.S.C. § 824d(c). Equally to the point, this is precisely the mistake that the Ninth Circuit made, and that this Court recently corrected, in *Central Office Telephone*.

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[6] The court of appeals cites cases in which, it says, FERC enforced unfiled rates taken pursuant to contract clauses contemplating such actions or rates. App. 9a-10a. But in all of these cases the rate adjustments made were "automatic," *id.*, so that an outsider could examine the contract and determine its terms. That stands in marked contrast to this case, as the court of appeals observed. *Id.* at 10a.

Central Office Telephone, like this case, involved the breadth of the filing requirement under the filed rate doctrine. There, a reseller of long distance telephone services sought to sue AT&T, a provider of such services, for breach of contract and associated torts under state law in connection with the billing and provisioning of long distance services. AT&T argued that the filed rate doctrine preempted any such state law claims because, to be binding, contractual terms concerning the provisioning and billing of services would have to be included in any filed tariff. The Ninth Circuit held that the filed rate doctrine was not applicable, "'[b]ecause this case does not involve rates or ratesetting, but rather involves the provisioning of services and billing.'" 524 U.S. at 223 (alteration in original).

This Court emphatically rejected any such narrow construction of the scope of the filed rate doctrine, observing that rates "do not exist in isolation" and that, for example, rates "have meaning only when one knows the services to which they are attached." *Id.* That, the Court concluded, is why the filed tariff must "show not only 'charges,' but also 'the classifications, practices, and regulations affecting such charges.'" *Id.* "[D]iscriminatory 'privileges' come in many guises, and are not limited to discounted rates." *Id.* at 224 (discussing *Chicago & Alton R.R.* v. *Kirby*, 225 U.S. 155 (1912) and *Davis* v. *Cornwell*, 264 U.S. 560 (1924) (applying the filed rate doctrine to special services, such as the provision of a particularly fast train and a specified number of cars on a particular day)). Thus, the Court held, the filed rate doctrine applies to all matters covered by the tariff at issue.

In so doing, this Court affirmed a long line of authority holding that the filed rate doctrine is not limited to rates, but also governs all related issues, including, for example, the quantity of power that a customer is obligated or permitted to buy at a given rate during a specified time, and charges for deficiencies or abandonment. See *Nantahala Power & Light Co.* v. *Thornburg*, 476 U.S. 953, 966 (1986); *United Gas Pipe*

Line Co. v. *Mobile Gas Serv. Corp.*, 350 U.S. 332, 342 (1956); *Associated Gas Distribs.* v. *FERC*, 893 F.2d 349, 356 & n.1 (D.C. Cir. 1989). The filing requirements apply to any and all terms in the filed schedule.

Central Office Telephone demonstrates that NEPCO was required to file with FERC Norwood's exercise of its option to extend the contract at issue. Plainly, the length of a contract affecting a rate is covered by a tariff and is, indeed, a critical provision of the tariff. Any outsider examining the filed tariff at issue here would not have been able to discern the length of the contract and, accordingly, could not have determined the rates or any related term for time periods covered as a result of the exercise of the option. The First Circuit's contrary determination violates the filed rate doctrine and is inconsistent with this Court's decision in *Central Office Telephone*.

II. THE COURT OF APPEALS' DECISION SIGNIFICANTLY UNDERMINES THE FILED RATE DOCTRINE.

The filed rate doctrine "allows purchasers of gas to know in advance the consequences of the purchasing decisions they make." *Transwestern Pipeline Co.* v. *FERC*, 897 F.2d 570, 577 (D.C. Cir. 1990). By doing so, it "promotes certainty in the market, discourages undesirable price discrimination, and preserves the regulator's authority to determine at the threshold whether particular rates or practices are unlawful." *Consolidated Edison Co.* v. *FERC*, 958 F.2d 429, 432 (D.C. Cir. 1992). By providing all rates and rate-related information to the public, discrimination is prevented, because, in the words of the court of appeals here, an "outsider could visit the Commission's files" and discover the precise terms of any rate agreement. App. 10a. The filed rate is, accordingly, "'treated as though it were a statute, binding upon the seller and the purchaser alike.'" *Boston Edison Co.* v. *FERC*, 856 F.2d 361, 372 (1st Cir. 1988) (quoting *Northwestern Pub.*

Serv. Co. v. *Montana-Dakota Utils. Co.*, 181 F.2d 19, 22 (8th Cir. 1950)).

The First Circuit's decision undermines the salutary purposes and the effects of the filed rate doctrine. By concluding the doctrine does not cover duration – which is plainly a critical contractual term that "affect[s] or relates to" rates – the court has thrown the scope of the filed rate doctrine into doubt. At common law, a provision altering a contract's term would plainly be considered contractual in nature; in common sense terms, the duration of a contract plainly affects or relates to the rates contained in that contract. All contracts have a term, and many contracts provide for extension in a variety of ways. The First Circuit's decision thus creates substantial and damaging uncertainty about the scope of the filed rate doctrine, uncertainty this Court sought to dispel in *Central Office Telephone*.

As critically, the decision has called into question when the exercise of an option in a filed contract requires a new filing. It had seemed clear that no new filing was required when a contract provided for automatic rate and rate-related adjustments and that a new filing was required when a contract simply created an option. See, *e.g.*, *Arkla*, 453 U.S. 571, 582 (1981). But the court of appeals' decision treats automatic and optional alterations identically and requires filing for neither. This is not a small matter. Many rate-related contracts contain provisions that contemplate changes; if wholly optional changes made pursuant to such provisions need not be filed, the filed rate doctrine will suffer substantial damage.

The uncertainty about the scope of the filed rate doctrine creates a significant loophole in the protection conferred on utility customers by the filed rate doctrine. Before the Commission's decision in this case, electric utility customers knew that they "could visit the Commission's files" and know precisely all of the terms applicable at a particular time, including the duration of the utility's contracts. App. 10a. Here, however, regardless of how carefully the documents

filed with the Commission were scrutinized, the duration of Norwood's contract with NEPCO, and hence the terms in effect for the period of extension, could not have been determined. The consequences of this uncertainty are exacerbated in this case by the fact that the CTC which NEPCO wishes to impose on Norwood was not contained in Tariff No. 1 at the critical time when petitioner made its decision to terminate its service with NEPCO. More broadly, in subsequent cases, customers and outsiders examining FERC's files to determine an electric utility's charges will be uncertain about the future duration of the contracts filed.

Such uncertainty is particularly damaging now, because the process of deregulation of the electrical industry is in full swing. See, *e.g.*, *Transmission Access Policy Study Group* v. *FERC*, 225 F.3d 667, 681 (D.C. Cir. 2000) (*per curiam*), *petitions for cert. filed*, 69 U.S.L.W. 3281 (Oct. 12, 2000) (No. 00-568), 69 U.S.L.W. 3382 (Nov. 20, 2000) (Nos. 00-800, 00-809). The filed rate doctrine has fully retained its vitality in the new era of competition, and the free access that the doctrine assures to rates and rate-related information enhances the development of nascent competition in the industry.

The First Circuit's decision to defer to an agency's interpretation of filing requirements to permit enforcement of "secret," unfiled agreements creates a significant breach in the filed rate doctrine. *Maislin Indus., U.S., Inc.* v. *Primary Steel, Inc.*, 497 U.S. 116, 130 (1990). In *Maislin*, this Court reaffirmed its conclusion that *any* interpretation of statutory filing requirements that would permit the enforcement of an agreement, like the 1990 Letter, which was never filed with the agency "'opens the door to the possibility of the very abuses of unequal rates which it was the design of the statute to prohibit and punish.'" *Id.* at 131 (quoting *Armour Packing Co.* v. *United States*, 209 U.S. 56, 81 (1908)). Because "Congress has not diverged from this interpretation," *id.*, this Court should grant the petition to counteract inconsistent

agency and lower court analyses and to protect the future efficacy of the filed rate doctrine.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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December 22, 2000

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FIRST CIRCUIT

No. 99-2155

TOWN OF NORWOOD, MASSACHUSETTS,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

NEW ENGLAND POWER COMPANY,
Intervenor.

Heard April 6, 2000.
Decided June 29, 2000.

Rehearing and Suggestion for Rehearing
En Banc Denied Aug. 25, 2000.

Before BOUDIN, STAHL and LIPEZ, Circuit Judges.

BOUDIN, Circuit Judge.

In this case, the Town of Norwood, Massachusetts, seeks review of orders of the Federal Energy Regulatory Commission ("FERC") denying Norwood's petition for declaratory rulings. The case is a sequel to *Town of Norwood v. FERC*, 202 F.3d 392 (1st Cir.), *petition for cert. filed* (U.S. May 30, 2000) (No. 99-1914) ("*Norwood I*"), in which this court sustained related FERC orders. *See also Town of Norwood v. New England Power Co.*, 202 F.3d 408 (1st Cir.), *petition for cert. filed* (U.S. May 30, 2000) (No. 99-1913) ("*Norwood II*"). The pertinent facts, for which detailed

background can be found in *Norwood I* and *Norwood II*, are as follows.

For many years, New England Power Company was a major integrated electric utility in New England: it generated power, distributed it as a wholesaler to affiliates and non-affiliates alike, and retailed power through its local affiliates such as Massachusetts Electric Company. Norwood, which operates a municipal electric company that distributes retail power to residents and businesses in the town, was a long-time purchaser of power from Boston Edison Company, but in 1983 Norwood began to purchase power instead from New England Power.

This opportunity to switch power suppliers was secured after Norwood settled an antitrust case against Boston Edison and New England Power. *See Norwood II*, 202 F.3d at 412. The settlement agreement obligated New England Power to furnish, and Norwood to accept, sufficient power to satisfy Norwood's requirements for electricity through October 31, 1998. The power was to be supplied pursuant to New England Power's FERC Tariff No. 1—the same wholesale tariff under which New England Power then supplied electricity to its own retail affiliates—"as [it] may be amended from time to time." *Id.*

The requirements contract provided that its term was from November 1, 1983, to October 31, 1998, but it also stated that "[n]either [New England Power] nor Norwood will give notice of termination prior to November 1, 1991 and shall not specify a termination date prior to November 1, 1998." New England Power's FERC Tariff No. 1, incorporated by reference in its power contract with Norwood, said that "[o]nce initiated, service under this tariff shall continue until terminated by either party giving to the other at least seven years' written notice of termination. . . ."

Thereafter, the parties twice amended the requirements contract. First, in 1987 the contract was amended to permit Norwood to take advantage of allocations of lower-cost power from the New York Power Authority. Second, in 1989 the parties amended the contract to permit Norwood at its election to extend the earliest date on which notice of termination could be given from November 1, 1991, to November 1, 2001.

On July 25, 1990, Norwood sent a letter to New England Power stating that Norwood "hereby gives notice . . . that it extends the date" for giving notice of termination from November 1, 1991, to November 1, 2001. The letter continued: "The effect of this is that the Power Contract between [New England Power] and Norwood would be extended for [ten] years to midnight, October 31, 2008. . . ." Whether Norwood did intend to extend the contract and whether the extension was effective are principal issues in this case.

Beginning in December 1996, New England Power made a set of regulatory filings to restructure itself and to revise its existing tariff for wholesale power sales. These filings, described in detail and upheld in *Norwood I*, aimed to secure FERC approval for the sale of New England Power's non-nuclear generating facilities, the release (on payment of termination charges) of affiliates from their long-term requirements contracts with New England Power, and the restructuring of New England Power's wholesale rates to facilitate customer choice and market-based pricing at both the wholesale and retail levels. *Norwood I*, 202 F.3d at 396-97.

In a set of orders issued between November 1997 and June 1998, FERC approved the sale, early termination by affiliates on payment of termination charges, the restructuring of wholesale rates, and a "rate freeze" on New England Power's existing charges with wholesale contract purchasers like

Norwood. This freeze was instituted because under the existing contracts, rates were normally adjusted to reflect increased costs, and New England Power was now divesting itself of its low-cost non-nuclear plants. *Norwood II*, 202 F.3d at 413.

Norwood concluded that under the new regime it would be disadvantaged vis-à-vis New England Power's retail affiliates whom Norwood regards as retail competitors. *See Norwood II*, 202 F.3d at 414. On March 4, 1998, Norwood notified New England Power that it was switching to a new wholesale supplier, Northeast Utilities. Two weeks later, on March 18, 1998, New England Power filed a revised FERC Tariff No. 1 permitting dissident wholesale customers like Norwood to terminate their contracts early and on only thirty days' notice, conditioned on the customers paying a contract termination charge based on an avoided cost theory.[1] *New England Power Co.*, 83 F.E.R.C. ¶ 61,174, *reh'g denied*, 84 F.E.R.C. ¶ 61,175 (1998).

To counter New England Power's March 18, 1998, tariff filing, Norwood not only objected to the charge before FERC, *see Norwood I*, 202 F.3d at 398, but also, in an effort to shorten the period of liability, Norwood petitioned FERC in April 1999 for a declaratory order, 18 C.F.R. § 385.207 (1999), that its contract with New England Power had terminated on October 31, 1998, and that New England Power therefore had no basis for claiming any contract termination charges after that date. Norwood estimates that if fully allowed, the charges will exceed $7 million per year until 2008.

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[1] The contract termination charge is computed as the revenues that New England Power would have expected to collect had the customer continued to pay at the now frozen tariff rate through the earliest date that the customer could have unilaterally terminated service under the contract, less the expected costs avoided by New England Power because it did not have to provide the power.

FERC dismissed Norwood's petition on the merits on June 21, 1999, *Town of Norwood*, 87 F.E.R.C. ¶ 61,341 (1999). In a nutshell, the Commission found that Norwood had extended the contract through October 31, 2008, by its July 25, 1990, letter; and it concluded that New England Power's failure to file that letter with FERC was irrelevant. On August 20, 1999, FERC denied without opinion Norwood's motion for rehearing, and Norwood has sought review in this court to challenge the Commission's orders, 16 U.S.C. § 825*l*(b).

Norwood's arguments on appeal, which we address in a sequence somewhat different from Norwood's brief, are in substance five: (1) that the requirements contract with New England Power was never extended beyond October 31, 1998; (2) that any extension premised on the July 25, 1990, letter is ineffective because the letter was not filed with FERC and because reliance upon it violates the so-called filed rate doctrine; (3) that the FERC order unilaterally altered the contract in disregard of the *Mobile-Sierra* doctrine; (4) that the failure to file the letter prevents FERC from relying on it in construing the contract; and (5) that FERC committed procedural error.

Assuming *arguendo* that the July 25, 1990, letter was rightly considered, it is clear to us that FERC properly construed the contract to extend Norwood's obligation to take its requirements from New England Power until October 31, 2008. The standard of review need not be considered because, even if review of the contract interpretation question were *de novo*, our reading would still be precisely that of the Commission. *Cf. Boston Edison Co. v. FERC*, 856 F.2d 361, 363-64 (1st Cir.1988). The documents may be inartfully drafted, but taken together, they make clear that Norwood's contract interpretation argument is hopeless.

It is arguable that even without the July 25, 1990, letter, the proper reading of the original 1983 contract made it

self-extending absent notice of termination.[2] However, there is no reason to decide how matters would stand if there had been no 1989 amendment and letter. Norwood's July 25, 1990, letter triggered a provision in the 1989 amendment to the original 1983 contract and when both the amendment and the letter are considered, it is crystal clear that—subject to any other possible legal barrier—Norwood's obligation was extended through October 31, 2008.

The 1989 amendment explicitly replaced the article of the 1983 agreement specifying the term of the contract with a new article which specified that the contract continued through midnight, October 31, 1998, *except*: (1) neither side could give notice of termination prior to November 1, 1991, or specify a termination date prior to November 1, 1998; *and* (2):

> Norwood may elect to extend the earliest date by which either party can give notice of intent to terminate service by a total of [twenty] years in two ten-year increments. In order to exercise this election, Norwood agrees to provide [New England Power] with written notice of each such election at least one year prior to the date that it is to be extended, viz, to November 1, 2001 initially and to November 1, 2011 ultimately.

Citing this amended article, Norwood on July 25, 1990, wrote New England Power giving notice that it extended the date by which either side could give notice of an intent to terminate "to November 1, 2001. The effect of this is that the Power Contract between [New England Power] and Norwood would be extended for [ten] years to midnight, October 31, 2008. . . ."

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[2] The original contract said that its term was through October 31, 1998, but FERC Tariff No. 1. said that seven years' notice is required to terminate; while the contract has an overrule provision, it is not clear that the two terms are inconsistent.

Norwood argues that the letter was an offer that New England Power failed to accept; but the 1989 amendment, which Norwood explicitly invokes in the 1990 letter, gives Norwood a unilateral election to extend by written notice, which is just what the 1990 letter comprises. Norwood also says that the 1990 letter merely extends the earliest date on which the notice of termination can be given and does not extend the agreement itself; but this is just word play in the context of this contract.

Norwood makes a further contract interpretation argument based on the 1987 amendment which was designed to allow Norwood to reduce its obligation to purchase from New England Power to the extent that Norwood could obtain a lower-cost allocation from the New York Power Authority. Norwood's explanation as to how this 1987 amendment supports its position is not persuasive enough to merit detailed response. The short answer is that the 1987 amendment, which had a quite limited focus, was followed by a 1989 amendment providing Norwood an election to extend the obligations through 2008; and this provision for an election, which Norwood exercised, controls any prior terms, whether adopted in 1983 or in 1987.

Norwood's second multi-part argument is that the July 25, 1990, letter was ineffective to extend the contract until 2008 because the letter was never filed with FERC. The governing provision of the Federal Power Act provides that utilities subject to its terms, which includes New England Power with respect to wholesale power sales, must file with FERC:

> schedules showing all rates and charges for any transmission or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with *all contracts* which in any manner affect or relate to such rates, charges, classifications, and services.

16 U.S.C. § 824d(c) (1994) (emphasis added). The statute also requires that any change in a rate or contract must be reflected in a filing with the Commission which, absent a waiver, must be made in advance of the effective date and on sixty days' notice. *Id.* § 824d(d).

Although the statute does not say so explicitly, it might be read as saying that an unfiled contract is ineffective; and in any event, FERC regulations say that a public utility may not (to shorten the language to pertinent terms) "collect . . . any rate" or "impose any . . . contract" for FERC-regulated service "which is different from that provided in a rate schedule required to be on file with this Commission unless otherwise specifically provided by order of the Commission for good cause shown." 18 C.F.R. § 35.1(e) (1999). "Rate schedule" is defined to include both a statement of rates and charges for electric service and "all classifications, practices, rules, regulations or contracts which in any manner affect or relate to the aforementioned service, rates, and charges." *Id.* § 35.2. The importance attributed to filings is reinforced by the so-called filed rate doctrine.

The filed rate doctrine, discussed at greater length in *Norwood II*, 202 F.3d at 416, 418-22, is actually a set of rules that have evolved over time but revolve around the notion that under statutes like the Federal Power Act, utility filings with the regulatory agency prevail over unfiled contracts or other claims seeking different rates or terms than those reflected in the filings with the agency. *See, e.g., AT & T v. Central Office Telephone, Inc.*, 524 U.S. 214, 221-24, 118 S.Ct. 1956, 141 L.Ed.2d 222 (1998); *Montana-Dakota Utilities v. Northwestern Pub. Serv. Co.*, 341 U.S. 246, 251-52, 71 S.Ct. 692, 95 L.Ed. 912 (1951). Norwood's theory is that the unfiled July 25, 1990, letter was ineffective because not filed (as required by statute and regulations) and because giving the unfiled letter effect would violate the filed rate doctrine.

In both variations, Norwood's argument depends on the proposition that the July 25, 1990, letter was a contract required to be filed. The gist of the Commission's holding is that the *contract* was what was set forth in the 1983 contract and the 1989 amendment, both of which were filed with the Commission; the letter merely exercised an election already spelled out in those filings. The Commission also gave other alternative reasons for relying on the 1990 letter, which we will defer for the present.

The reference in the statute and regulations to the filing of "contracts" which affect rates and services is ambiguous. On the one hand, the July 25, 1990, letter is not itself a contract in common usage; it is the exercise of a unilateral election by one party under an already existing contract. On the other hand, the election had the effect of extending the contract term by multiple years, albeit within the framework of the existing contract. If the Commission wanted to characterize such notices as "contracts," it would be a linguistic stretch but arguably within the Commission's authority to construe its organic statute and regulations.

However, the Commission has construed the statute and regulations *not* to encompass a notice of election already provided for by a duly filed contract. This interpretation is subject to substantial deference under the *Chevron* doctrine.[3] Further, in the *Towns of Concord and Wellesley v. FERC*, 844 F.2d 891 (1st Cir.1988), this court upheld a decision of FERC giving effect to an unfiled letter terminating a provision in a filed agreement where the agreement itself contemplated such a termination letter. The analogy offered was to automatic rate adjustment clauses which, "[o]nce the rate schedule is

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[3] *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-45, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984); *see also Mississippi Power & Light Co. v. Mississippi*, 487 U.S. 354, 380-82, 108 S.Ct. 2428, 101 L.Ed.2d 322 (1988) (Scalia, J., concurring); *City of Cleveland v. FERC*, 773 F.2d 1368, 1376 (D.C.Cir.1985).

approved, [permit] rate adjustments [to] be made in accordance with the internally-prescribed automatic adjustment clause without further notice to action by the Commission." *Id.* at 896 (citing 16 U.S.C. § 824d(f)); *see also Transwestern Pipeline v. FERC*, 897 F.2d 570, 578 (D.C.Cir.), *cert. denied*, 498 U.S. 952, 111 S.Ct. 373, 112 L.Ed.2d 335 (1990).

Norwood counters by citing *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 101 S.Ct. 2925, 69 L.Ed.2d 856 (1981) ("*Arkla*"), but we think that case is distinguishable. There, the Supreme Court held that a filed tariff rate for the purchase of natural gas prevailed over *Arkla's* promise, made in a filed agreement, to pay a higher rate if *Arkla* paid more to other producers (the "favored nations" clause). But the Supreme Court stressed that it was unclear whether FERC would have accepted the higher rate resulting from the favored nations clause; and FERC said in *Arkla* that its acceptance of the contract did not constitute pre-approval of any rate generated by the favored nations clause. *See Arkla*, 453 U.S. at 578-82 & n. 11, 101 S.Ct. 2925.

Needless to say, without the filing of the July 25, 1990, letter, no outsider could visit the Commission's files and determine whether the election to extend had been exercised. This provides whatever policy argument there might be for a broad interpretation of "contracts" in the statute. But even in the halcyon days of strict public utility regulation, now receding at FERC as elsewhere, *see Norwood I*, 202 F.3d at 396, there were gaps in what could be gleaned from Commission filings. And this is the kind of grey area—the determination of just what the Commission needs to have filed beyond formal contracts themselves—in which great weight must be given to the Commission's judgment. *City of Cleveland v. FERC*, 773 F.2d 1368, 1376 (D.C.Cir.1985).

We thus conclude that the Commission did not act contrary to the Federal Power Act or its own regulations in giving

effect to the unfiled July 25, 1990, letter as an election to extend the term of the contract. By the same token it is unnecessary to elaborate on the filed rate doctrine because giving effect to the notice does not circumvent any filing requirement or contradict any extant filing. This is enough to resolve the claims made by Norwood and makes it unnecessary for us to consider what we regard as more doubtful alternative reasons given by the Commission for its order.

By contrast, in our case there is no effort by anyone to charge or obtain a rate different than that on file with the Commission. And, as for duration, *all* of the contract terms being given effect by the FERC orders under review are on file with the Commission; the Norwood-New England Power contract amendment, filed with the Commission in 1989, explicitly permitted Norwood to elect to extend the contract (which Norwood then did). Thus, the Commission, when it accepted the amendment for filing, knew that Norwood now had the option to extend the duration by specific increments. This is a situation very different from *Arkla* where, based on a "favored nations" clause containing no specific rate, the producer sought—over the Commission's expressed objection—to recover from the purchasing utility a rate for natural gas higher than the specific rate on file with the Commission.

Third, because we accept the Commission's interpretation of the July 25, 1990, letter as representing Norwood's election to extend its contract to 2008, the *Mobile-Sierra* doctrine invoked by Norwood does not apply. That doctrine prohibits a regulated utility from unilaterally changing the fixed terms of a utilities contract absent a finding by FERC that the existing term adversely affects the public interest. *FPC v. Sierra Pacific Power Co.*, 350 U.S. 348, 353-55, 76 S.Ct. 368, 100 L.Ed. 388 (1956); *United Gas Pipe Line v. Mobile Gas Serv. Corp.*, 350 U.S. 332, 343-45, 76 S.Ct. 373, 100 L.Ed. 373 (1956). FERC's reasonable construction of a

contract in favor of a public utility is not a unilateral change in the contract.

In its fourth argument for reversal, Norwood argues that, if New England Power was not required to file the July 25, 1990, letter, then FERC lacked the authority to interpret it. This might be so if the letter's subject matter were outside FERC's jurisdiction—for example, if it addressed only intrastate power sales. *Cf. Pennzoil v. FERC*, 645 F.2d 360, 382 (5th Cir.1981), *cert. denied*, 454 U.S. 1142, 102 S.Ct. 1000, 71 L.Ed.2d 293 (1982). However, there is no doubt that the letter in this case related to a filed contract for the wholesale supply of electric power within FERC's jurisdiction.

FERC sometimes declines to address contract issues even for sales unquestionably within its jurisdiction, *see, e.g., Southern Cal. Edison Co.*, 85 F.E.R.C. ¶ 61,023 (1998), but Norwood makes no claim that FERC is forbidden from interpreting contracts filed with FERC or otherwise relevant to FERC tariffs. Here, the duration of the contract directly affects Norwood's liability under the March 1998 tariff imposing a termination charge; and Norwood itself sought the declaration from FERC as to whether the contract continued past October 1998. The letter was properly considered as a document pertinent to determining the duration of the contract. *Cf. Southern Union Co. v. FERC*, 857 F.2d 812, 815-16 (D.C.Cir.1988), *cert. denied*, 493 U.S. 1072, 110 S.Ct. 1118, 107 L.Ed.2d 1025 (1990).

Finally, Norwood offers a procedural objection to the Commission's proceedings. After FERC issued its notice of the filing of Norwood's petition for a declaratory ruling, FERC granted New England Power leave to intervene out of time, and it accepted New England Power's answer to Norwood's petition. Norwood now complains because FERC then denied Norwood's motion for leave to file a reply, citing

a FERC procedural rule prohibiting answers to answers. 18 C.F.R. § 385.213(a)(2) (1999).

Perhaps in some situations it might be improper for an agency effectively to deny the petitioner the right to respond to assertions raised for the first time in an answering document, although refusal to allow a formal "reply" is not automatically the same as precluding evidence or argument. The short answer in this case is that nothing in Norwood's proffered reply, which is included in the appendix filed with this court, alters the result: in general, the reply sets forth arguments that were effectively addressed by FERC in its orders or could not affect the outcome in light of dispositive rulings by FERC.

The petition for review is *denied*.

APPENDIX B

Town of Norwood, Massachusetts

Docket No. EL99-56-000

Order Dismissing Petition for Declaratory Order

(Issued June 21, 1999)

Before Commissioners: James J. Hoecker, Chairman; Vicky A. Bailey, William L. Massey, Linda Breathitt, and Curt Hébert, Jr.

Introduction

On April 8, 1999, the Town of Norwood, Massachusetts (Norwood) filed a petition for a declaratory order seeking the Commission's determinations that: (a) a power contract between the New England Power Company (NEPCO) and Norwood terminated on October 31, 1998; (b) NEPCO made no filing with the Commission of any agreement by Norwood to extend the contract beyond October 31, 1998; and (c) NEPCO thus has no basis for claiming any contract termination charge (CTC) against Norwood after October 31, 1998.[1] In this order, the Commission dismisses the petition.

Background

The power contract at issue, under which Norwood agreed to purchase all its power requirements from NEPCO, was

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[1] Norwood also seeks an exemption in lieu of filing fee, arguing that, as a municipality, it is exempt from fees under 18 C.F.R. § 381.108 (1998). We grant the exemption.

executed on April 11, 1983 pursuant to a federal court consent decree. In the contract, NEPCO agreed to provide all-requirements service to Norwood pursuant to NEPCO's Tariff No. 1. Tariff No. 1 provided that "[o]nce initiated, service under this tariff shall continue until terminated by either party giving to the other at least seven years' written notice of termination. . . ." [2] Article III of the contract established an earliest termination date of October 31, 1998, and provided that "[n]either [NEPCO] nor Norwood will give notice of termination prior to November 1, 1991 and shall not specify a termination date prior to November 1, 1998." [3]

On May 1, 1987, NEPCO and Norwood executed an amendment to the power contract (1987 Amendment), addressing the fact that the original contract did not reflect Norwood's allocation of New York Power Authority (NYPA) power. The 1987 Amendment made adjustments to account for Norwood's NYPA allocation, gave Norwood the option, effective November 1, 1998, of receiving all its requirements in excess of its NYPA allocation from NEPCO in accordance with the tariff, and provided that "[w]ritten notice of intent to exercise this option must be provided by Norwood on or before November 1, 1997." [4] Norwood did not exercise this option.[5]

On January 11, 1989, NEPCO and Norwood executed a second amendment to the power contract (1989 Amendment). The 1989 Amendment provided that "Norwood may elect to extend the earliest date by which either party can give notice of intent to terminate service by a total of 20 years in two ten-year increments. In order to exercise this election, Norwood

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[2] Norwood Petition for Declaratory Order, Ex. 1 at 21.

[3] *Id.*, Ex. 1 at 3.

[4] *Id.*, Ex. 6.

[5] *Id.* at 5.

agrees to provide [NEPCO] with written notice of each such election at least one year prior to the date that it is to be extended, viz to November 1, 2001 initially and to November 1, 2011 ultimately."[6] NEPCO filed this amendment with the Commission and it was accepted in an unpublished letter-order on March 29, 1989 in Docket No. ER89- 216-000.

On July 25, 1990, Norwood sent a letter to NEPCO, stating the following:

> The Town of Norwood, Massachusetts hereby gives notice to New England Power Company that it extends the date by which either [NEPCO] or Norwood could give notice of intent to terminate service from the present date of November 1, 1991, contained in the Power Contract between [NEPCO] and Norwood dated April 11, 1983, to November 1, 2001. The effect of this is that the Power Contract between [NEPCO] and Norwood would be extended for 10 years to midnight, October 31, 2008 (Article III, Paragraph A).
>
> This notice is given pursuant to Article III of the contract of April 11, 1983, as amended January 11, 1989.[7]

On March 18, 1998, in Docket No. ER98-2233-000, NEPCO filed an amendment to Tariff No. 1 to permit its Tariff No. 1 customers the option of terminating service early, subject to the payment of a CTC. The amendment was scheduled to become effective March 31, 1998. The CTC was designed to compensate NEPCO for the revenues it would otherwise be entitled to collect in the absence of the customer's early termination of its Tariff No. 1 service agreement, as adjusted for the revenues attributable to NEPCO's transmission costs. The CTC would be collected until such time as the customer could have unilaterally

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[6] *Id.*, Ex. 1 at 51-52.

[7] *Id.*, Ex. 7.

terminated service under the service agreement with NEPCO. The amendment implemented a commitment NEPCO made as part of its application in Docket Nos. EC98-1-000 and ER98-6-000, wherein NEPCO, among other things, agreed to divest certain jurisdictional facilities as part of the sale of substantially all of its non-nuclear generating assets to USGen New England, Inc. (USGenNE), and agreed to offer its customers an "open season" in which they could terminate their wholesale requirements service early, subject to the payment of a CTC.[8]

In its May 15, 1998 order in Docket No. ER98-2233-000, *New England Power Company*, 83 FERC ¶ 61,174, at pp. 61,721-23, *reh'g denied*, 84 FERC ¶ 61,175 (1998) (*NEPCO*), the Commission noted NEPCO's statement that the proposed amendment (requiring the payment of a CTC) would permit Norwood to terminate its existing Tariff No. 1 service effective April 1, 1998, consistent with Norwood's written notice to NEPCO, dated March 4, 1998.[9] The Commission further noted NEPCO's statement that, absent the proposed amendment, Norwood would not be permitted to terminate its Tariff No. 1 service prior to November 1, 2008 because of certain conditions set forth in Norwood's

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[8] In *New England Power Company, et al.*, 82 FERC ¶ 61,179, *reh'g denied*, 83 FERC ¶ 61,275 (1998), the Commission approved the proposed divestiture.

[9] On March 4, 1998, Norwood sent NEPCO aletter asserting that, as a result of the divestiture of its non-nuclear generating facilities, NEPCO had breached its contract, and that Norwood, accordingly, was terminating the contract effective April 1, 1998 and taking service from another supplier, Northeast Utilities Service Company (NUSCO). Norwood stated that it was withdrawing its earlier notice of 1990 to extend the power contract of April 11, 1983 for ten years from its express termination date of October 31, 1998 to October 31, 2008. Norwood Petition for Declaratory Order, Ex. 7.

service agreement (*i.e.*, the 1989 Amendment). Norwood argued that the Commission should dismiss NEPCO's filing in Docket No. ER98-2233-000 pending resolution of an action in the United States District Court for the District of Massachusetts. There, Norwood alleged that NEPCO's voluntary divestiture of non-nuclear generating facilities resulted in a breach of the 1983 federal court decree giving rise to the power contract at issue, a breach of contract under Norwood's service agreement with NEPCO, and a violation of federal antitrust statutes.

The Commission approved the amendment and authorized the CTC. The Commission stated:

> The fact that Norwood is litigating in court the issue of whether NEPCO's voluntary divestiture of its non-nuclear generating facilities constituted a breach of contract on NEPCO's part does not affect NEPCO's right to seek from this Commission an early termination exit fee amendment for its tariff of general applicability. NEPCO is offering customers an option they would not otherwise have unless the customers were to file a Section 206 proceeding to amend the contract and bear the burden of presenting evidence that the contract is no longer just and reasonable (and, in Norwood's case, that Norwood should be able to break the contract without paying costs owed under the contract). Norwood, of course, can always file a Section 206 complaint, as discussed above, during the pendency of the court action.

83 FERC at p. 61,724.

Subsequently, by decision entered September 28, 1998, *Town of Norwood, Massachusetts v. New England Power Company, et al.*, 23 F. Supp. 2d 109 (D. Mass. 1998) (*Town*

of Norwood), the District Court dismissed Norwood's action.[10]

Norwood's Petition

Norwood argues that NEPCO's attempt to collect CTC payments after October 31, 1998 violates the *Mobile-Sierra doctrine*,[11] because it involves a unilateral contract change to which Norwood did not consent,[12] and violates the filed rate doctrine.[13] Norwood further argues that NEPCO's failure to file the July 25, 1990 letter and obtain Commission approval for any extension of the contract beyond October 31, 1998 conflicts with the Commission's order in *Prior Notice and Filing Requirements, Part II of the Federal Power Act*, 64 FERC ¶ 61,139, *order on reh'g*, 65 FERC ¶ 61,081 (1993) (*Prior Notice* order), in which the Commission required public utilities to file all contracts or extensions with the Commission.[14] Norwood also argues that NEPCO's failure to file the July 25, 1990 letter violates Sections 205(c) and (d) of the Federal Power Act (FPA).[15] Finally, Norwood states that the 1989 Amendment related only to the giving of notice of intent to terminate service if Norwood exercised its option,

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[10] Norwood did not file a Section 206 complaint during the pendency of the court action.

[11] The *Mobile-Sierra* doctrine derives from the Supreme Court's decisions in *United Gas Pipe Line v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956) (*Mobile*) and *FPC v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956) (*Sierra*).

[12] Norwood Petition for Declaratory Order at 13-16.

[13] *Id.* at 17-18. The filed rate doctrine states that public utilities cannot charge rates for their services other than those filed with the appropriate regulatory authority. *Arkansas-Louisiana Gas Co. v. Hall*, 453 U.S. 571 at 577 (1981).

[14] Norwood Petition for Declaratory Order at 19-20.

[15] 16 U.S.C. § 824d(c) and (d) (1994). Norwood Petition for Declaratory Order at 21-22.

under the 1987 Amendment, to extend the contract. Norwood argues that since it did not exercise its option under the 1987 Amendment, the July 25, 1990 letter (based on the 1989 Amendment) is a nullity.[16]

Notice of the filing was published in the *Federal Register*, 64 *Fed. Reg.* 23,612 (1999), with comments, protests and interventions due on or before May 10, 1999. On May 10, 1999, NEPCO filed an answer to the petition for declaratory order, but did not formally request intervention. On May 11, 1999, NEPCO filed a motion to intervene out of time and a corrected answer.

In its answer, NEPCO states that this is the third attempt by Norwood to escape from its power contract without paying a CTC—the previous two attempts having been rejected by the Commission and the District Court. NEPCO argues, *inter alia*, that the July 25,1990 extension of the contract term is valid and serves as a basis to require a CTC after October 31, 1998. NEPCO also argues that there was no violation of *Mobile-Sierra*, the filed rate doctrine, or the filing requirements of Section 205 of the FPA and the Commission's regulations.

On May 25, 1999, Norwood filed a motion for leave to file a reply and reply to NEPCO's answer. On May 26, 1999, NEPCO filed a motion for expedited consideration and dismissal of Norwood's petition.

Discussion

Given the nature of the proceeding, and the absence of undue prejudice or delay, we will grant NEPCO's motion to intervene out of time and accept its corrected answer. We will reject Norwood's motion to file a reply to NEPCO's

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[16] *Id.* at 23-29.

answer. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure prohibits answers to answers. [17]

We will dismiss the petition for declaratory order. Norwood argues that the July 25, 1990 letter extended the earliest date for giving a notice of termination, but did not extend the termination date itself. We disagree. In the July 25, 1990 letter, Norwood explicitly stated that the effect of the extension of the earliest date for giving notice of termination is that the contract would be extended for 10 years until midnight, October 31, 2008 (*i.e.*, seven years after the notice of termination date).[18] Thus, as Norwood itself acknowledged, its voluntary extension of the earliest date for notice of termination also extended the contract term. [19] We reject Norwood's contention that the July 25, 1990 letter could not have extended the term of the contract because Norwood did not exercise its option to extend under the 1987 Amendment. The 1987 Amendment addressed only Norwood's NYPA allocation, while neither the 1989 Amendment (to which the July 25, 1990 letter referred) nor the letter itself was limited to the NYPA allocation. Because we find that Norwood's July 25, 1990 letter extended the term of the contract from October 31, 1998 to October 31, 2008, we also reject Norwood's argument that NEPCO's attempt to collect a CTC after October 31, 1998 constituted a unilateral contract change in violation of the *Mobile-Sierra* doctrine.

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[17] *See* 18 C.F.R. § 385.213(a)(2) (1998).

[18] As noted, Tariff No. 1 required a seven-year notice of termination, and prohibited either party from giving notice before November 1, 1991. Under the 1989 Amendment, extensions of the notice of termination date were to be allowed in 10-year increments. Norwood's letter of July 25, 1990 thus had the effect of extending the earliest notice of termination date to November 1, 2001.

[19] We note that in *Town of Norwood*, the district court also described Norwood as having "exercised its contractual option to extend its contract with NEPCO until October 31, 2008." 23 F. Supp. 2d at 113.

We also disagree with Norwood that the July 25, 1990 letter was a nullity because it was not filed with the Commission. As an initial matter, we note that whether the July 25, 1990 letter was filed with the Commission is irrelevant to the issue of whether that letter constitutes a binding agreement by Norwood to extend the term of the contract.[20] As explained above, we find that the July 25, 1990 letter by its explicit terms extended the term of the contract by 10 years.

Moreover, we conclude that the July 25, 1990 letter was not required to be filed with the Commission. The Commission, in approving the 1989 Amendment, preapproved several options for the parties, including the option by Norwood to elect to extend the earliest date by which either party could give notice of intent to terminate service by a total of 20 years in ten-year increments. Because the July 25, 1990 letter was Norwood's exercise of a preapproved option, it thus was not required to be filed with the Commission (although it could have been filed for informational purposes).

Norwood's claim that NEPCO violated the *Prior Notice* order by not filing the July 25, 1990 letter also fails. We explain above why the July 25, 1990 letter, as Norwood's exercise of a preapproved option, was not required to be filed with the Commission. In any event, as NEPCO notes,[21] the *Prior Notice* order required all utilities to file all agreements under which jurisdictional service was being provided for a

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[20] *See, e.g., Sam Rayburn Dam Electric Cooperative v. FPC*, 515 F.2d 998, 1008-09 (D.C. Cir. 1975) (parties are bound by modified terms of a contract whether or not they are filed with the Commission); *Borough of Lansdale, Pennsylvania v. FPC*, 494 F.2d 1104, 1114 (D.C. Cir. 1974) ("regulatory force of a contract arises before, and survives in the absence of, the physical filing of the document with the Commission.").

[21] NEPCO Answer at 12.

two-year period prior to the issuance of that policy.[22] Here, no service was being provided under the contract extension and service would not have begun until November 1, 1998, had Norwood not previously repudiated the contract.

Finally, we reject Norwood's argument that, under the filed rate doctrine, NEPCO's failure to file the July 25, 1990 letter bars it from recovering CTCs after October 31, 1998. As stated above, Norwood's July 25, 1990 letter was effective even though unfiled and, in any event, was not required to be filed.

The Commission orders:

(A) Norwood's motion for exemption in lieu of filing fee is hereby granted, as discussed in the body of this order.

(B) Norwood's petition for declaratory order is hereby dismissed, as discussed in the body of this order.

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[22] 64 FERC at p. 61,978.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 99-2155

TOWN OF NORWOOD, MASSACHUSETTS,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent,

NEW ENGLAND POWER COMPANY,
Intervenor.

ORDER OF COURT
Entered: August 25, 2000

Before Torruella, *Chief Judge*, Selya, Boudin, Lynch and Lipez, *Circuit Judges*.

The panel of judges that rendered the decision in this case having voted to deny the petition for rehearing and the suggestion for the holding of a rehearing en banc having been carefully considered by the judges of the Court in regular active service and a majority of said judges not having voted to order that the appeal be heard or reheard by the Court en banc,

It is ordered that the petition for rehearing and the suggestion for rehearing en banc be denied.

By the Court:

Phoebe Morse, Clerk.
By Janice M. O'Neil
Chief Deputy Clerk.

APPENDIX D

STATUTES

16 U.S.C. § 824d. Rates and charges; schedules; suspension of new rates; automatic adjustment clauses

(a) Just and reasonable rates

All rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

* * * *

(c) Schedules

Under such rules and regulations as the Commission may prescribe, every public utility shall file with the Commission, within such time and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection schedules showing all rates and charges for any transmission or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Notice required for rate changes

Unless the Commission otherwise orders, no change shall be made by any public utility in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after sixty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public

inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the sixty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

* * * *

(June 10, 1920, c. 285, § 205, as added Aug. 26, 1935, c. 687, Title II, § 213, 49 Stat. 851, and amended Nov. 9, 1978, Pub.L. 95-617, Title II, §§ 207(a), 208, 92 Stat. 3142.)

16 U.S.C. § 825*l*. Review of orders

* * * *

(b) Judicial review

Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the United States Court of Appeals for any circuit wherein the licensee or public utility to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of Title 28. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the

order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of Title 28.

* * * *

(June 10, 1920, c. 285, § 313, as added Aug. 26, 1935, c. 687, Title II, § 213, 49 Stat. 860, and amended June 25, 1948, c. 646, § 32(a), 62 Stat. 991; May 24, 1949, c. 139, § 127, 63 Stat. 107; Aug. 28, 1958, Pub.L. 85-791, § 16, 72 Stat. 947.)

APPENDIX E

REGULATIONS

18 C.F.R. § 35.1 Application; obligation to file rate schedules.

(a) Every public utility shall file with the Commission and post, in conformity with the requirements of this part, full and complete rate schedules, as defined in § 35.2(b), clearly and specifically setting forth all rates and charges for any transmission or sale of electric energy subject to the jurisdiction of this Commission, the classifications, practices, rules and regulations affecting such rates and charges and all contracts which in any manner affect or relate to such rates, charges, classifications, services, rules, regulations or practices, as required by section 205(c) of the Federal Power Act (49 Stat. 851; 16 U.S.C. 824d(c)). Where two or more public utilities are parties to the same rate schedule, each public utility transmitting or selling electric energy subject to the jurisdiction of this Commission shall post and file such rate schedule, or the rate schedule may be filed by one such public utility and all other parties having an obligation to file may post and file a certificate of concurrence on the form indicated in § 131.52 of this chapter: *Provided, however*, In cases where two or more public utilities are required to file rate schedules or certificates of concurrence such public utilities may authorize a designated representative to file upon behalf of all parties if upon written request such parties have been granted Commission authorization therefor.

(b) A rate schedule applicable to a transmission or sale of electric energy, other than that which proposes to supersede, supplement, cancel or otherwise change the provisions of a rate schedule required to be on file with this Commission, shall be filed as an initial rate in accordance with § 35.12.

(c) A rate schedule applicable to a transmission or sale of electric energy which proposes to supersede, supplement,

cancel or otherwise change any of the provisions of a rate schedule required to be on file with this Commission (such as providing for other or additional rates, charges, classifications or services, or rules, regulations, practices or contracts for a particular customer or customers) shall be filed as a change in rate in accordance with § 35.13, except Notices of Cancellation or Termination which shall be filed as a change in accordance with § 35.15.

(d)(1) The provisions of this paragraph (d) shall apply to rate schedules tendered for filing on or after August 1, 1976, which are applicable to the transmission or sale of firm power for resale to an all-requirements customer, whether tendered pursuant to § 35.12 as an initial rate schedule or tendered pursuant to § 35.13 as a change in an existing rate schedule whose term has expired or whose term is to be extended.

(2) Rate schedules covered by the terms of paragraph (d)(1) of this section shall contain the following provision when it is the intent of the contracting parties to give the party furnishing service the unrestricted right to file unilateral rate changes under section 205 of the Federal Power Act:

> Nothing contained herein shall be construed as affecting in any way the right of the party furnishing service under this rate schedule to unilaterally make application to the Federal Energy Regulatory Commission for a change in rates under section 205 of the Federal Power Act and pursuant to the Commission's Rules and Regulations promulgated thereunder.

(3) Rate schedules covered by the terms of paragraph (d)(1) of this section shall contain the following provision when it is the intent of the contracting parties to withhold from the party furnishing service the right to file any unilateral rate changes under section 205 of the Federal Power Act:

The rates for service specified herein shall remain in effect for the term of ——— or until ———, and shall not be subject to change through application to the Federal Energy Regulatory Commission pursuant to the provisions of Section 205 of the Federal Power Act absent the agreement of all parties thereto.

(4) Rate schedules covered by the terms of paragraph (d)(1) of this section, but which are not covered by paragraphs (d)(2) or (d)(3) of this section, are not required to contain either of the boilerplate provisions set forth in paragraph (d)(2) or (d)(3) of this section.

(e) No public utility shall, directly or indirectly, demand, charge, collect or receive any rate, charge or compensation for or in connection with electric service subject to the jurisdiction of the Commission, or impose any classification, practice, rule, regulation or contract with respect thereto, which is different from that provided in a rate schedule required to be on file with this Commission unless otherwise specifically provided by order of the Commission for good cause shown.

(f) A rate schedule applicable to the sale of electric power by a public utility to the Bonneville Power Administration under section 5(c) of the Pacific Northwest Electric Power Planning and Conservation Act (Pub.L. No. 96-501 (1980)) shall be filed in accordance with subpart D of this part.

[Order 271, 28 FR 10573, Oct. 2, 1963, as amended by Order 541, 40 FR 56425, Dec. 3, 1975; Order 541-A, 41 FR 27831, July 7, 1976; 46 FR 50520, Oct. 14, 1981; Order 337, 48 FR 46976, Oct. 17, 1983; Order 541, 57 FR 21734, May 22, 1992]

18 C.F.R. § 35.13 Filing of changes in rate schedules.

* * * *

(a) *General rule.* Every public utility shall file the information required by this section, as applicable, at the time it

files with the Commission under § 35.1 of this part all or part of a rate schedule to supersede, supplement, or otherwise change the provisions of a rate schedule filed with the Commission under § 35.1. Any petition filed under § 385.207 of this chapter for waiver of any provision of this section shall specifically identify the requirement that the applicant wishes the Commission to waive.

(1) *Filing for any rate schedule change not otherwise excepted.* Except as provided in paragraph (a)(2) of this section, any utility that files a rate schedule change shall submit with its filing the information specified in paragraphs (b), (c), (d), (e), and (h) of this section, in accordance with paragraph (g) of this section.

(2) *Abbreviated filing requirements*—(i) *For certain small rate increases.* Any utility that files a rate increase for power or transmission services not covered by paragraph (a)(2)(ii) of this section may elect to file under this paragraph instead of paragraph (a)(1) of this section, if the proposed increase for the Test Period, as defined in paragraph (a)(2)(i)(A) of this section, is equal to or less than $200,000, regardless of customer consent, or equal to or less than $1 million if all wholesale customers that belong to the affected rate class consent.

(A) *Definition*: The *Test Period*, for purposes of paragraph (a)(2)(i) of this section, means the most recent calendar year for which actual data are available, the last day of which is no more than fifteen months before the date of tender for filing under § 35.1 of the notice of rate schedule.

(B) Any utility that elects to file under this subparagraph must file the following information, conforming its submission to any rule of general applicability and to any Commission order specifically applicable to such utility:

(*1*) A complete cost of service analysis for the Test Period, consistent with the requirements of paragraph (h)(36), Statement BK, of this section.

(*2*) A complete derivation and explanation of all allocation factors and special assignments, consistent with the information required in § 35.12(b)(5).

(*3*) A complete calculation of revenues for the Test Period and for the first 12 months after the proposed effective date, consistent with the requirements of paragraph (c)(1) of this section.

(*4*) If the proposed rates contain a fuel cost or purchased economic power adjustment clause, as defined in § 35.14, the company must provide the derivation of its base cost of fuel (Fb) and its monthly fuel factors (Fm) for the Test Period and the resulting fuel adjustment clause revenues. If any pro forma adjustments affect the fuel clause in any way, the company must show the impact on Fm, kWh sales in the base period (Sm), Fb and kWh sales in the current period (Sb), as well as on fuel adjustment clause revenues.

(*5*) Rate design calculations and narrative consistent with the information required in paragraph (h)(37) of this section and in § 35.12(b)(5).

(*6*) The information required in paragraphs (b), (c)(2) and (c)(3) of this section and in § 35.12(b)(2).

(C) Data shall be reconciled with the utility's most recent FERC Form 1. If the utility has not yet submitted Form 1 for the Test Period, the utility shall submit the relevant Form 1 pages in draft form.

(D) The utility may make pro forma adjustments for post-Test Period changes that occur before the proposed effective date and that are known and measurable at the time of filing. The utility shall provide a narrative statement explaining all pro forma adjustments.

(E) If the utility models its filing in whole or in part on retail rate decisions or settlements, the utility must provide detailed calculations and a narrative statement showing how all retail rate treatments are factored into the cost of service.

(F) If the Commission sets the filing for hearing, the Commission will allow the company a specific time period in which to file testimony, exhibits, and supplemental workpapers to complete its case-in-chief. While not required under this subpart, a utility may elect to submit Statements AA through BM for the Test Period in accord with the requirements of paragraphs (d), (g) and (h) of this section.

(ii) *Rate increases for service of short duration or for interchange or coordination service.* Any utility that files a rate increase for any service of short duration and of a type for which the need and usage cannot be reasonably forecasted (such as emergency or short-term power), or for service that is an integral part of a coordination and interchange arrangement, may submit with its filing only the information required in paragraphs (b), (c) and (h)(37) of this section and in § 35.12(b)(2) and (b)(5), conforming its submission to any rule of general applicability and to any Commission order specifically applicable to such utility.

(iii) *For rate schedule changes other than rate increases.* Any utility that files a rate schedule change that does not provide for a rate increase or that provides for a rate increase that is based solely on a change in delivery points, a change in delivery voltage, or a similar change in service, must submit with its filing only the information required in paragraphs (b) and (c) of this section.

(iv) *Computing rate increases.* For purposes of this subparagraph and paragraph (d)(2)(ii) of this section, the amount of any rate increase shall be the difference between the total revenues to be recovered under the rate schedule change and the total revenues recovered or recoverable under

the rate schedule to be superseded or supplemented and shall be determined by:

(A) Applying the components of the rate schedule to be superseded or supplemented to the billing determinants for the twelve months of Period I;

(B) Applying the components of the rate schedule change to the billing determinants for the twelve months of Period I; and

(C) Subtracting the total revenues under subclause (A) from the total revenues under subclause (B).

(3) *Cost of service data required by letter.* The Director of the Office of Electric Power Regulation may, by letter, require a utility that is not required under paragraph (a)(1) of this section to submit cost of service data to submit such specified cost of service data as are needed for Commission analysis of the rate schedule change.

* * * *

(c) *Information relating to the effect of the rate schedule change.* Any utility subject to paragraph (a) of this section shall also file the following information or materials:

(1) A table or statement comparing sales and services and revenues from sales and services under the rate schedule to be superseded or supplemented and under the rate schedule change, by applying the components of each such rate schedule to the billing determinants for each class of service, for each customer, and for each delivery point or set of delivery points that constitutes a billing unit:

(i) Except as provided in clause (ii), for each of the twelve months immediately before and each of the twelve months immediately after the proposed effective date of the rate schedule change, and the total for each of the two twelve month periods; or

(ii) At the election of the utility:

(A) If the utility files Statements BG and BH under paragraph (h) for Period I, for each of the twelve months of Period I instead of for the twelve months immediately before the proposed effective date of the rate schedule change; and

(B) If Period II is the test period, for each of the twelve months of Period II instead of for the twelve months immediately after the proposed effective date of the rate schedule change;

(2) A comparison of the rate schedule change and the utility's other rates for similar wholesale for resale and transmission services; and

(3) If any specifically assignable facilities have been or will be installed or modified in order to supply service under the rate schedule change, an appropriate map or sketch and single line diagram showing the additions of changes to be made.

* * * *

(Federal Power Act, 16 U.S.C. 792-828c; Dept. of Energy Organization Act, 42 U.S.C. 7101-7352; E.O. 12009, 42 FR 46267, 3 CFR 142 (1978); Pub. L. 96-511, 94 Stat. 2812 (44 U.S.C. 3501 *et seq.*))

[Order 91, 45 FR 46363, July 10, 1980, as amended at 47 FR 6826, Feb. 17, 1982; Order 225, 47 FR 19056, May 3, 1982; Order 298, 48 FR 24354, June 1, 1983; 51 FR 7782, Mar. 6, 1986; Order 475, 52 FR 24993, July 2, 1987; Order 545, 57 FR 53990, Nov. 16, 1992; Order 575, 60 FR 4854, Jan. 25, 1995]

(2)

Supreme Court, U.S.
FILED
FEB 20 2001
OFFICE OF THE CLERK

No. 00-1025

IN THE

Supreme Court of the United States

TOWN OF NORWOOD, MASSACHUSETTS,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

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BRIEF OF INTERVENOR NEW ENGLAND POWER COMPANY IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Section 205 of the Federal Power Act requires contracts which affect or relate to wholesale power rates to be filed, and provides that "no change shall be made by any public utility" in a filed contract except after sixty days' public notice, "[u]nless the [Federal Energy Regulatory] Commission otherwise orders." 16 U.S.C. § 824d(c), (d).

The question presented is whether, where a wholesale power contract gives the customer an option to extend, the Commission has discretion to order enforcement of the customer's letter exercising that option, where the contract giving the customer the option was on file but the customer's letter exercising the option was not.

RULE 29.6 STATEMENT

New England Power Company is a wholly owned subsidiary of National Grid USA, which is a wholly owned indirect subsidiary of National Grid Group plc, a United Kingdom-based company which has issued common stock to the public.

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IN THE

Supreme Court of the United States

No. 00-1025

TOWN OF NORWOOD, MASSACHUSETTS,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF OF INTERVENOR NEW ENGLAND POWER COMPANY IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

STATEMENT OF THE CASE

Petitioner was a wholesale power customer of New England Power Company ("NEPCO"), under a contract scheduled to terminate no earlier than October 31, 1998 and requiring seven years' notice of termination. Under the contract, petitioner agreed to purchase power under NEPCO's wholesale tariff, as amended from time to time. In 1989, the contract was amended to give petitioner an option to extend the contract by a total of twenty years in two ten-year increments. On July 25, 1990, petitioner sent NEPCO a letter exercising the option to extend the contract for the first ten-year increment, to October 31, 2008. Pet. App. 2a-3a. The power sales contract, including the 1989 amendment creating the customer's option to extend, was filed with the Federal

Energy Regulatory Commission ("FERC"). Petitioner's extension letter was not.

Beginning in 1996, a series of structural changes designed to foster competition took place in the power market. Petitioner decided that it wanted to escape its contract with NEPCO, in order to seek alternative sources of supply at competitive prices, and not pay NEPCO any termination charges for premature termination of its contract.

Petitioner's first move was to sue NEPCO for antitrust violations and breach of contract. The breach of contract claim and all but one of the antitrust claims have been dismissed; one antitrust claim is still pending in the district court. *Town of Norwood v. New England Power Co.*, 23 F.Supp.2d 109 (D.Mass. 1998), *rev'd in part* 202 F.3d 408 (1st Cir. 2000), *cert. denied* 121 S.Ct. 57 (2000).

Petitioner's second move was to challenge at FERC the imposition of any termination charge for early contract termination. As part of its restructuring effort, NEPCO entered into a settlement with its wholesale customers, permitting them to terminate their contracts early in return for payment of a contract termination charge. Petitioner refused to participate in the settlement, but instead brought an unsuccessful challenge. *Town of Norwood v. FERC*, 202 F.3d 392, 397 (1st Cir. 2000), *cert. denied*, 121 S.Ct. 57 (2000).

Without waiting for the outcome of its lawsuits, on March 4, 1998, petitioner unilaterally terminated its contract with NEPCO, citing its subsequently-rejected breach-of-contract and antitrust claims, and signed a contract with a new supplier at a rate it deemed more favorable. In response, since the contract did not provide for premature termination, NEPCO filed a tariff amendment with FERC allowing its non-settling customers to terminate early, but requiring a termination charge. FERC approved the tariff amendment.

Petitioner's challenge to FERC's decision was unsuccessful. *Town of Norwood v. FERC*, *supra*.

The contract termination charge approved by FERC consisted of a formula, based on anticipated revenue less anticipated market price of power, for the remainder of the contract. In calculating the amount of the charge, it made a difference whether the contract was viewed (absent early termination) as extending to October 31, 2008.[1] Consequently, petitioner asked FERC for an order declaring that its July 25, 1990 extension of the contract was null and void. Petitioner argued that its July 25, 1990 letter extending the contract to October 31, 2008 should be disregarded, because it was never filed.

FERC ruled 1) that the July 25, 1990 letter was binding on petitioner regardless of whether it was required to be filed, and 2) because the Commission had already approved the option to extend as contained in the filed sales contract, a further filing was not required when petitioner exercised the option. Pet. App. 22a.

The court of appeals affirmed, concluding that FERC had the discretion not to view a customer's letter exercising an option under a filed contract as a separate "contract" requiring additional filing. Pet. App. 9a.

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[1] The contract required seven years' notice of termination. Had petitioner given such notice on the date it purported to terminate immediately (March 4, 1998), it could have terminated legitimately as of March 4, 2005 (assuming its exercise of the option to extend to October 31, 2008 was invalid). Accordingly, this litigation involves termination fees for the period March 4, 2005 to October 31, 2008.

REASONS FOR DENYING THE PETITION

1. Neither the language nor the statutory purpose of section 205 of the Federal Power Act require filing of customer exercises of options under power sales contracts, where the contract itself has been filed. The governing provision is section 205(d), which provides:

> Unless the Commission otherwise orders, no change shall be made by any public utility in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after sixty days' notice to the Commission and to the public.

16 U.S.C. § 824d(d). Even if the customer's exercise of a contractual option were viewed as a "change" in the contract, it is clearly not a change "by any public utility." And in any event, even if this provision required filing, it allows the Commission to "otherwise order[]," which the Commission has done here.

2. The filing requirement of the Federal Power Act has several related purposes, none of which would be served by requiring the filing of customer exercises of contractual options. First, filing provides the Commission with "the information necessary to decide whether an investigation and suspension of proposed rates should be ordered." *Papago Tribal Utility Authority v. FERC*, 628 F.2d 235, 247 (D.C.Cir. 1980). Second, it also "give[s] the public notice of proposed changes and opportunity to protest." *Southern Motor Carriers Rate Conference, Inc. v. United States*, 676 F.2d 1374, 1377 (11th Cir. 1982). Finally, the requirement of adherence to filed rates—the so-called filed rate doctrine—supports "the policy of nondiscriminatory rates" by preventing utilities from discriminating in favor of some customers by giving them secret deals not available to all customers. *AT&T v. Central Office Telephone, Inc.*, 524 U.S. 214, 223, (1998); *see Maislin Industries, U.S. v. Primary Steel, Inc.*, 497 U.S. 116, 126 (1990).

None of these purposes would be served by requiring the filing of a customer's exercise of an option set forth in a filed contract, or by refusing to enforce an unfiled option exercise. Where the customer option is contained in a filed contract, as was the case here, the Commission has already had the opportunity to determine whether it is just and reasonable, and members of the public have had the opportunity to challenge it. Members of the public and the Commission may also determine from filed contracts whether the utility has made the same option available to all its customers on equal terms. Once the contract containing the option has been publicly filed and members of the public and the Commission have had an opportunity to review it, a second proceeding to review the customer's exercise of the option would serve no discernible purpose.

There is no basis for the public or the Commission to second-guess the "justness and reasonableness" of the *customer's* decision to exercise an option. The Federal Power Act does not require the *customer*'s decision to be "just and reasonable," if the option itself is "just and reasonable" (which can be determined when the contract creating the option is filed).

Nor does the exercise of an option present a discrimination problem. If the option is available to all similarly situated customers (which can be determined from reviewing the filed contracts), there is no undue discrimination if one customer decides to exercise an option and another does not.

Finally, the public information purpose of the filing requirement does not apply to a customer's exercise of an option under the filed contract. Filing serves the purpose of "giv[ing] the public notice of proposed changes and opportunity to protest." *Southern Motor Carriers Rate Conference v. United States*, *supra*, 676 F.2d at 1377. Filing also enables members of the public to determine what rates are available. But, neither of these purposes is implicated

when a customer exercises an option. There is no basis for public protest of a customer's unilateral decision to exercise (or not to exercise) an option, because the Federal Power Act does not require the *customer's* decision to be "just and reasonable" or nondiscriminatory, as long as the contract itself meets those standards. And what rates are available can be determined by inspecting the utility's filed contracts. A customer's decision to exercise or not exercise an option has nothing to do with what rates the utility has made available.

Moreover, where the filed contract contains an option to extend, the absence in FERC's files of a notice of termination informs the public that service is still being provided under the contract. Under FERC regulations, a utility is required to file a notice with FERC when a filed contract expires and no new contract is filed in its place. 18 C.F.R. §35.15.[2] Thus if the visitor to FERC's files sees a contract with an option to extend, and the original termination date has passed with no filing of a substitute contract or a notice of termination, then the visitor can conclude that the option was exercised.

3. The decision below does not conflict with any decision of this Court or of another court of appeals. All of the cases cited by petitioner apply the filed rate doctrine in circumstances that fulfill the purposes of that doctrine. None of these purposes are implicated here.

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[2] The regulation requires filing a notice of termination for any "rate schedule or part thereof." 18 C.F.R. § 35.15(a). "Rate schedule" is defined to include contracts affecting rates. 18 C.F.R. § 35.2(b)(3). Filing is required when the contract "is to terminate by its own terms," as well as when it is cancelled. 18 C.F.R. §35.15(a). For contracts executed before July 9, 1996 (which includes Norwood's contract), the notice must be filed at least 60 days before the termination is to take effect. 18 C.F.R. §35.15(b). For other contracts, the notice must be filed within 30 days after the termination takes place. 18 C.F.R. § 35.15(c).

Petitioners cite *AT&T v. Central Office Telephone, Inc., supra*, where this Court held that an unfiled agreement on terms of service was unenforceable under the filed rate doctrine, because secret agreements on terms of service might give one customer "'an undue advantage . . . that is not one open to others in the same situation.'" *Id.*, 524 U.S. at 224, quoting *Chicago & Alton R. Co. v. Kirby*, 225 U.S. 155, 163, 165 (1912). But there is no danger of discrimination when a customer exercises an option available under a filed contract. As long as the same option is available to all (which can be determined from inspection of the filed service contracts), the exercise of the option by one customer, and the decision by another customer not to exercise the option, raises no issue of discrimination.

Petitioner also cites *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571 (1981) ("*Arkla*"), which held that the filed rate doctrine precluded a state court breach of contract action based on the contention that the contract's "favored nation" clause required the customer to pay more than the filed rate, after the customer bought power from a third party at a higher rate without notifying the seller or the Commission. The Court concluded that allowing a state court to determine what rate should have been charged would be inconsistent with the Congressional purpose to "grant[] exclusive authority over rate regulation to the Commission." *Arkla*, 453 U.S. at 580.

Here, since the Commission itself has enforced petitioner's exercise of its option, the Commission's exclusive rate authority is unchallenged. *Arkla* presented a direct challenge to the Commission's authority because the Commission had approved only a "favored-nation" clause of the service contract, but not the specific terms of any rate that might be imported into the contract through the customer's third-party purchases in transactions not subject to the Commission's jurisdiction. This threatened a complete bypass of

Commission authority through state-court enforcement of the favored-nation clause.[3]

By contrast, in this case the Commission's approval of the options clause in the sales contract was limited to two ten-year extensions, and the contract itself provided that the rate charged during the extension period would be in accordance with NEPCO's filed tariff (which the customer could challenge at any time under section 206 of the Act). Thus the Commission's own action in enforcing the option exercise was well within the defined limitations it had approved when the service contract itself was filed. Unlike *Arkla*, the Commission's decision in this case did not involve another tribunal undermining the Commission's authority by imposing a rate or term of service the Commission had never had an opportunity to review.

Not only does the court of appeals' decision affirming the Commission not conflict with the decisions of this Court, it does not conflict with the decision of any other court of appeals. Petitioner cites court of appeals decisions holding that the *utility* could not change the rate at which it sold power, even where the change was authorized by a price escalation clause in the filed contract. *Cities Service Gas Prod. Co. v. FPC*, 233 F.2d 726, 730-31 (10th Cir. 1956); *Episcopal Theological Seminary v. FPC*, 269 F.2d 228 (D.C.Cir.), *cert. denied*, 361 U.S. 895 (1959); *Phillips Petroleum Co. v. FPC*, 258 F.2d 906 (10th Cir. 1958). *See also Mississippi Power & Light Co. v. Memphis Natural Gas Co.*, 162 F.2d 388 (5th Cir.), *cert. denied*, 332 U.S. 770

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[3] The lower courts held that the customer's royalty payments under gas leases from the United States were "purchases" triggering the most-favored nations clause in the customer's service contract. The Commission apparently had not approved the leases. *Arkla*, 453 U.S. at 574; *see Arkansas-Louisiana Gas Co. v. Hall*, 13 FERC ¶ 61,100 at 61,210 (1980).

(1947) (utility's action in giving another customer a more favorable price does not trigger favored-nation clause without an additional filing).

In all these cases, however, the issue was whether the *utility* could take action under the filed contract changing the rate paid by the customer, without an additional filing. Because the *utility* is subject to the statutory obligation to charge just and reasonable and nondiscriminatory rates, filing was necessary to insure that its actions complied with those standards. That does not support petitioner's contention that *customers*—who are not subject to those obligations—cannot validly exercise and be bound by options available under filed service agreements without making an additional filing.

4. Petitioner's theory is that any time a customer has an option under its power service contract, its exercise of the option changes the legal relations of the parties and therefore creates a new "contract" or changes the existing contract, requiring a new filing under the Federal Power Act. That theory ignores the language of section 205(d), which requires public notice of changes in filed contracts only where the change is "by any public utility," and authorizes the Commission to "otherwise order[]." 16 U.S.C. § 824d(d). Even where the change is by the utility rather than by the customer, the statute clearly gives FERC the discretion to decide if and when the filing of an option exercise is required.

Acceptance of petitioner's contrary interpretation would have far-reaching consequences, because it would force FERC to require the filing of option exercises where no purpose would be served other than increasing administrative burdens. Power service contracts frequently give customers the option to choose among several preexisting, specified alternatives relating to the terms and conditions of service. It has not heretofore been thought that every exercise of customer choice requires a new filing; and any such requirement would impose a significant and unnecessary

paperwork impediment to normal commercial transactions among utilities and their customers.

For example, power service contracts frequently give the customer an option as to amounts purchased. A customer may have an option to take less than all its requirements from a single supplier.[4] Under FERC's *pro forma* tariff for transmission service, a customer may have the option of ordering daily service within two days before service is to commence, or hourly service before noon on the preceding day.[5] Customers may have the option of choosing among types of service to be ordered.[6] A customer may have the option as to when service will commence.[7]

Petitioners cite no case ruling that every exercise of a customer option has to be filed. Indeed, under the identical filing provisions of the Natural Gas Act, the Commission has ruled that it would permit pipelines to file *pro forma* agreements with blanks to reflect, among other things, "maximum delivery obligations." *Natural Gas Pipeline*

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[4] *Panhandle Eastern Pipe Line Co. v. FERC*, 881 F.2d 1101, 1104-5 (D.C. Cir. 1989) (customer has option to buy from other suppliers); *Public Service Co. v. New Mexico v. FPC*, 557 F.2d 227, 229-30 (10th Cir. 1977) (customer has option to take any amount of power up to a specified maximum for two years after giving notice of termination). While these cases involved the Natural Gas Act, the filing provisions of that Act are identical to the filing provisions of the Federal Power Act. 15 U.S.C. §§ 717c(c) and (d).

[5] 62 F.R. 12464, 12473 (March 14, 1997) (FERC pro forma tariff for wholesale transmission service).

[6] The FERC pro forma tariff for wholesale transmission service allows customers to request certain types of additional services without amending their filed service agreements. 62 F.R. 12464, 12475 § 22 (March 14, 1997).

[7] The FERC pro forma tariff for wholesale transmission service allows customers to obtain up to five one-year extensions for commencement of service. 62 F.R. 12464, 12473 § 17.7 (March 14, 1997).

Company of America, 77 FERC ¶ 61,028 at 61,119 (1996). Where the exercise of customer options does not constitute a "material deviation" from filed service agreements, the Commission has not required additional filings. *Id.*, 77 FERC at 61,119.

Petitioner's theory would not only require filing in all those cases; it would also destroy the Commission's recent practice of accepting market-based rates in certain cases, under which the tariff simply states that the rate is at whatever level the buyer and seller agree to. Under petitioner's analysis, every transaction under a market-based tariff would represent a new "contract" requiring filing. Market-based tariffs have been upheld, where the Commission finds that the utility does not have market power that would enable it to charge unreasonable rates, on the premise that lack of market power eliminates the need for further regulation of individual transactions. *Elizabethtown Gas Co. v. FERC*, 10 F.3d 866, 870-71 (D.C.Cir. 1993). Separate filing of each transaction under market-based tariffs would be inconsistent with that premise, and in any event would be totally impractical, particularly in modern markets where power is sold on a daily or even hourly basis. [8]

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[8] In any event, FERC's decision to enforce the option exercise was right for an alternative reason. Section 205(c) of the Federal Power Act requires utilities to file contracts "within such time . . . as the Commission may designate." 16 U.S.C. § 824d(c). FERC regulations require filing not less than 60 nor more than 120 days before a contract change is proposed to become "effective." 18 C.F.R. § 35.3(a). FERC's order in this case cited a prior decision requiring the filing of agreements "under which jurisdictional service was being provided." Pet. App. 22a. FERC pointed out that "[h]ere, no service was being provided under the contract extension and service would not have begun until November 1, 1998, had Norwood not previously repudiated the contract [on March 4, 1998]." Pet. App. 23a. Thus the option exercise did not become "effective" until November 1, 1998, and NEPCO was not required to file it, if at all, until

Petitioner is asking this Court for a draconian interpretation of the filing requirement, denying FERC the discretion it has been granted by statute to decide what contract changes need to be filed, and advancing a legal theory that would have enormous adverse implications in current power markets. Consideration of that theory would be particularly inappropriate in a case where the only issue is whether a customer can escape the consequences of its own decision to extend its power purchase commitment. The Commission's decision was consonant with the purposes of the Federal Power Act and well within the Commission's *Chevron* discretion. There is no conflict with the decisions of this Court, or among the Circuits. Certiorari should be denied.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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February 21, 2001

September 1, 1998. By that date, Norwood already had terminated. FERC clearly had the discretion to conclude that a contract extension does not become "effective" for filing purposes until service under the extension begins. FERC could reasonably conclude that if it has to review the justness and reasonableness of a contract extension, it should do so shortly before service under the extension begins, rather than when the option to extend is exercised—which may be (as in this case) years earlier.

Supreme Court, U.S.
FILED
MAR 23 2001
CLERK

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner's exercise of an option to extend a wholesale power contract was effective where, although the underlying contract that contained the option had been filed with the Federal Energy Regulatory Commission, petitioner's notice of its exercise of the option was not filed with the Commission.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 217 F.3d 24. The order of the Federal Energy Regulatory Commission (Pet. App. 14a-23a) is reported at 87 F.E.R.C. ¶ 61,341.

JURISDICTION

The judgment of the court of appeals was entered on June 29, 2000. A petition for rehearing was denied on August 25, 2000 (Pet. App. 24a-25a). On November 13, 2000, Justice Souter extended the time within which to file a petition for a writ of certiorari to and including December 22, 2000, and the petition was filed on that

date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Section 205(c) of the Federal Power Act (FPA), 16 U.S.C. 824d(c), requires public electric utilities to file with the Federal Energy Regulatory Commission (Commission or FERC) all rates and charges pertaining to sales of electric power within the Commission's jurisdiction "and the classifications, practices, and regulations affecting such rates and charges," as well as all contracts that "affect or relate to such rates, charges, classifications, and services." Changes to previously filed rates or contracts must be submitted in accordance with Section 205(d) of the FPA, 16 U.S.C. 824d(d). Those statutory provisions are consistent with the judicially developed "filed rate doctrine," which generally forbids a utility from charging rates other than those on file with the regulating agency at the time the service is provided. See generally *Arkansas La. Gas Co. (Arkla)* v. *Hall*, 453 U.S. 571, 577-578 & n.7 (1981).

2. Beginning in 1983, petitioner purchased wholesale electric power from New England Power Company (NEPCO) for petitioner's municipal electric company. Pet. App. 2a.[1] NEPCO is a public utility subject to the Commission's jurisdiction under the FPA. The contract between petitioner and NEPCO stated that NEPCO would provide electric service to petitioner under NEPCO's FERC Tariff No. 1. *Ibid.* Tariff No. 1, in turn, provided that once NEPCO initiated service,

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[1] The 1983 contract and the history of petitioner's dispute with NEPCO are described in *Town of Norwood* v. *New England Power Co.*, 202 F.3d 408 (1st Cir.), cert. denied, 121 S. Ct. 57 (2000), and *Town of Norwood* v. *FERC*, 202 F.3d 392 (1st Cir.), cert. denied, 121 S. Ct. 57 (2000).

service would continue until terminated by either party's written notice of termination, which had to be provided at least seven years in advance. *Id.* at 15a. The contract fixed November 1, 1998 as the earliest date on which either party could terminate the contract. Consistent with the tariff's notice provision, the contract provided that petitioner and NEPCO could not give notice of termination prior to November 1, 1991 (seven years before the earliest possible termination date). *Id.* at 2a.

In 1989, petitioner and NEPCO amended their power contract to allow petitioner, at its option, to postpone the earliest date at which either party could give notice of termination by up to 20 years, in 10-year increments. Pet. App. 3a, 15a. Petitioner could exercise its option by providing NEPCO written notice one year before the date on which the extension would take effect. *Id.* at 15a-16a. NEPCO filed the contract amendment with the Commission, and the Commission accepted it on March 29, 1989. *Id.* at 16a.

On July 25, 1990, petitioner gave notice that it was extending the contract for the first 10-year increment. Petitioner's letter to NEPCO stated:

> The Town of Norwood, Massachusetts hereby gives notice to New England Power Company that it extends the date by which either [NEPCO] or Norwood could give notice of intent to terminate service from the present date of November 1, 1991, contained in the Power Contract between [NEPCO] and Norwood dated April 11, 1983, to November 1, 2001. The effect of this is that the Power Contract between [NEPCO] and Norwood would be extended for 10 years to midnight, October 31, 2008 (Article III, Paragraph A).

> This notice is given pursuant to Article III of the contract of April 11, 1983, as amended January 11, 1989.

Pet. App. 16a.

Beginning in 1996, NEPCO made a series of filings with the Commission in which it sought authority to restructure NEPCO and its services in preparation for competition among power suppliers. Among other things, NEPCO sought authority to divest some of its power-generating facilities. Petitioner objected to the proposed divestiture. Pet. 5; Pet. App. 3a-4a. After the Commission approved NEPCO's request, petitioner notified NEPCO on March 4, 1998 that it intended to terminate its contract with NEPCO as of April 1, 1998 —thus giving NEPCO less than one month's notice of termination. Pet. App. 3a-4a, 17a n.9. Petitioner further informed NEPCO that it was withdrawing its notice of July 25, 1990, which had extended the contract. *Id.* at 17a n.9.

On March 18, 1998, NEPCO responded by filing an amendment to its FERC Tariff No. 1 under which customers were given the option of terminating service on only 30 days' notice, subject to a charge that would compensate NEPCO for the early termination. Pet. App. 4a & n.1, 16a. NEPCO represented that, if approved by the Commission, the new option would allow petitioner to terminate its existing service effective on April 1, 1998, rather than on November 1, 2008 (the earliest date for termination under the 1983 contract as extended by petitioner in 1990). *Id.* at 17a-18a. The Commission rejected petitioner's objections to the amount of NEPCO's early-termination charge, and approved NEPCO's tariff amendment. *New England Power Co.*, 83 F.E.R.C. ¶ 61,174, reh'g denied, 84

F.E.R.C. ¶ 61,175 (1998), aff'd, *Town of Norwood* v. *FERC*, 202 F.3d 392 (1st Cir.), cert. denied, 121 S. Ct. 57 (2000).

3. In April 1999, petitioner requested that the Commission issue a declaratory order that petitioner's contract with NEPCO had terminated on October 31, 1998, so that NEPCO could not assess contract termination charges for any period after that date. Pet. App. 4a. The Commission rejected petitioner's request. *Id.* at 14a-23a.

The Commission found that petitioner's letter of July 25, 1990, validly extended the power contract until October 31, 2008. Pet. App. 21a-23a. In so ruling, the Commission rejected petitioner's claim that the contract extension was ineffective because NEPCO did not file petitioner's letter of July 25, 1990, with the Commission. The Commission explained that it had approved the 1989 amendment that allowed petitioner to extend the termination date, and petitioner's exercise of that already-approved option did not require further Commission approval. *Id.* at 22a-23a.

4. The court of appeals denied petitioner's petition for review. Pet. App. 1a-13a. The court found it "crystal clear" that under the terms of the 1989 amendment, petitioner's letter of July 25, 1990, did extend the power contract through October 31, 2008, at the earliest. *Id.* at 6a.

The court of appeals also rejected petitioner's contention that NEPCO's failure to file the July 25, 1990, letter with the Commission rendered the contract extension ineffective. Pet. App. 7a-11a. The court found nothing in Section 205 of the FPA (16 U.S.C. 824d) or in FERC's regulations that required NEPCO to file the letter. Section 205 and the regulations both require that public utilities file rates and charges, as well as

contracts that affect rates and charges. Pet. App. 8a; see 16 U.S.C. 824d(c) and (d); 18 C.F.R. 35.2. Because the contract extension did not change rates or charges, the issue was whether petitioner's July 25, 1990, letter invoking the contract-extension option was itself a contract (or contract amendment) that had to be filed. Pet. App. 9a. Noting that "it would be a linguistic stretch" to deem petitioner's notice a "contract," the court of appeals held that the issue was, in any event, resolved by the Commission's reasonable determination that neither the FPA nor Commission regulations require electric utilities to file a notice of election that is authorized under a previously filed contract. *Id.* at 9a & n.3.

The court of appeals found no inconsistency between the Commission's holding that the contract extension did not have to be filed and this Court's decision in *Arkla*, *supra*. Pet. App. 10a. That case involved a claim that Arkla's alleged purchase of higher-cost gas from the United States triggered the "most-favored nations clause" in Arkla's contract with private gas suppliers, so that the rate due to the private suppliers under the contract should have been the price Arkla was paying the United States, rather than the lower rate specified in the contract. See 453 U.S. at 573-576. This Court held that the rate schedule in Arkla's filed contract prevailed over Arkla's contingent promise to pay an unspecified higher rate under the most-favored nations clause. *Id.* at 579-584. The Court stressed that regulators' acceptance of Arkla's contract with the private suppliers did not constitute pre-approval of particular rates that might be calculated in the future under the most-favored nations clause. In fact, it was unclear whether a rate increase based on the most-

favored nations clause would have been approved. *Id.* at 580-582 & n.11.

The court of appeals distinguished *Arkla* on the basis that, in this case, "there is no effort by anyone to charge or obtain a rate different than that on file with the Commission. And, as for duration, *all* of the contract terms being given effect by the FERC orders under review are on file with the Commission." Pet. App. 11a. The court of appeals concluded that "[t]his is a situation very different from *Arkla* where, based on a 'favored nations' clause containing no specific rate, the producer sought—over the Commission's expressed objection—to recover from the purchasing utility a rate for natural gas higher than the specific rate on file with the Commission." *Ibid.*

Finally, the court of appeals rejected petitioner's arguments (not renewed in this Court) that the July 1990 extension of the power contract was invalid under the *Mobile-Sierra* doctrine,[2] that the Commission lacked authority to interpret the July 1990 letter, and that the Commission improperly denied petitioner an opportunity to file an additional pleading. Pet. App. 11a-13a.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review by this Court therefore is not warranted.

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[2] The *Mobile-Sierra* doctrine prohibits a regulated utility from changing the terms of a contract unilaterally, absent a Commission finding that the existing term adversely affects the public interest. See *FPC* v. *Sierra Pacific Power Co.*, 350 U.S. 348, 353-355 (1956); *United Gas Pipe Line Co.* v. *Mobile Gas Serv. Corp.*, 350 U.S. 332, 343-345 (1956).

1. Petitioner argues (Pet. 8-14) that the court of appeals' decision is inconsistent with the "teachings" (Pet. 9) of *Arkla* and *AT&T Co.* v. *Central Office Telephone, Inc.*, 524 U.S. 214 (1998). There is no conflict with either decision.

As the court of appeals explained, *Arkla* established that a properly filed rate is effective until it is replaced by another properly filed rate (or the rate is properly withdrawn), even if the utility's contracts arguably require the utility to replace the filed rate with a new, but unspecified, rate. See 453 U.S. at 578-582.[3] Here, however, the Commission approved petitioner's option to extend the contract termination date in 10-year increments when it accepted the 1989 contract amendment. When petitioner exercised that option in July 1990, it was simply availing itself of a term that had been offered by NEPCO and already approved by the Commission, and no further Commission approval was required. See Pet. App. 22a ("Because the July 25, 1990, letter was [petitioner's] exercise of a preapproved option, it thus was not required to be filed with the Commission.").

Petitioner further claims (Pet. 12-14, 15) that "[t]he real basis for the court of appeals' holding appears to be that the option at issue deals with contract length rather than rates" and, so construed, the decision below

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[3] All but one of the lower court decisions on which petitioner relies (Pet. 11-12), which pre-date *Arkla* by 20 years or more, are to the same effect as *Arkla*. The exception is *Episcopal Theological Seminary* v. *FPC*, 269 F.2d 228 (D.C. Cir.), cert. denied, 361 U.S. 895 (1959). That decision upheld application of a Federal Power Commission regulation under which every rate change was deemed to be a change in the rate schedule, which required refiling. *Id.* at 233-234. *Episcopal Theological Seminary* has no relevance to the FERC ruling under review in this case.

conflicts with *Central Office Telephone, supra.* In *Central Office Telephone*, the Court rejected the argument that the filed rate doctrine, as applied under the Communications Act of 1934 (ch. 652, 48 Stat. 1064, 47 U.S.C. 151 *et seq.*), applies only to rates themselves. Rather, the Court held, the doctrine forbids a utility from providing its customer "discriminatory privileges" that are inconsistent with the terms on file with the regulating agency. 524 U.S. at 223-224. That holding has no application here. Contrary to petitioner's mischaracterization of the decision below, the court of appeals fully recognized the breadth of the filed rate doctrine. The court of appeals simply (and correctly) concluded that "giving effect to the [July 25, 1990] notice does not circumvent any filing requirement or contradict any extant filing" relating to the power contract between petitioner and NEPCO. Pet. App. 11a. That is so because "*all* of the contract terms being given effect by the FERC orders under review are on file with the Commission." *Ibid.* In short, the unremarkable and entirely correct holding of the court of appeals was that the Commission's approval of the 1989 contract amendment constituted approval of the optional contract extension.

2. Petitioner further claims (Pet. 15-17) that, because NEPCO did not file the letter extending the contract termination date, the duration of the power contract between petitioner and NEPCO is no longer deducible from materials on file with the Commission. That result, petitioner argues, fosters uncertainty, allows "secret" agreements between utilities and their customers, and "creates a significant breach in the filed rate doctrine." Pet. 16.

Petitioner is mistaken. As an initial matter, petitioner's claim that the Commission's files historically

have revealed "precisely all of the terms applicable [to a regulated sale of electric power] at a particular time" (Pet. 15), is incorrect. As the court of appeals explained, there always have been "gaps in what could be gleaned from Commission filings." Pet. App. 9a-10a (citing *Towns of Concord & Wellesley* v. *FERC*, 844 F.2d 891 (1st Cir. 1988) (termination of a contract provision through an unfiled letter), and *Transwestern Pipeline Co.* v. *FERC*, 897 F.2d 570, 577-579 (D.C. Cir.) (inclusion of a rate formula rather than stated rates in a filed tariff), cert. denied, 498 U.S. 952 (1990)).

In this case, moreover, the Commission's files have revealed at all times what extension options are available to petitioner, and whether the contract is in force. The files contain the original contract, the 1989 amendment, and FERC Tariff No. 1, which collectively provide the relevant terms for extending or terminating the contract. See Pet. App. 15a-16a. The absence of any notice of termination of service in the file shows that the contract is still in force.[4] Thus, the Commission's files presently reveal both petitioner's right to extend the contract in 10-year increments, and that the parties did extend the contract beyond October 31,

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[4] Commission regulations require, for power contracts executed prior to July 9, 1996, that the Commission be notified at least 60 days in advance when a rate schedule on file is proposed to be canceled or is to terminate by its own terms and no new rate schedule is to be filed in its place. 18 C.F.R. 35.15(a) and (b). July 9, 1996 was the effective date of Commission Order No. 888, in which the Commission took steps to facilitate the development of a competitive wholesale market for electric power. See generally *Transmission Access Policy Study Group* v. *FERC*, 225 F.3d 667 (D.C. Cir. 2000), cert. granted *sub. nom. New York* v. *FERC*, No. 00-568 and *Enron Power Marketing, Inc.* v. *FERC*, No. 00-809 (Feb. 26, 2001).

1998. There is nothing "secret" about the terms of the agreement between petitioner and NEPCO.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted.

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MARCH 2001

Supreme Court, U.S.
FILED
APR 4 2001
CLERK

(4)

No. 00-1025

IN THE

Supreme Court of the United States

TOWN OF NORWOOD, MASSACHUSETTS,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

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REPLY BRIEF OF PETITIONER

INTRODUCTION

In its petition for certiorari, Town of Norwood, Massachusetts ("Norwood") raised an important question regarding the Federal Energy Regulatory Commission's ("FERC" or "Commission") decision to disregard the filed-rate doctrine in giving effect to an unfiled contract affecting the terms of the electrical service provided to Norwood by New England Power Company ("NEPCO"). Specifically, Norwood challenged FERC's determination that an unfiled ten-year extension of a power contract may be enforced, simply because a filed contract contains an option to extend.

This holding is flatly inconsistent with the filed-rate doctrine. When a filed contract contains an option affecting rates that may or may not be exercised, a party's decision to exercise the option creates a new contract that unquestionably must be

filed to be enforced. FERC's decision not to apply the filed-rate doctrine to the new contract here – either because the filed contract indicated that extension was an option or because the option pertained only to contract duration – is inconsistent with established authority. See *Arkansas Louisiana Gas Co.* v. *Hall*, 453 U.S. 571 (1981) ("*Arkla*"); *American Tel. & Tel. Co.* v. *Central Office Tel., Inc.*, 524 U.S. 214 (1998) ("*Central Office Telephone*"). It also contravenes the primary purposes of the filed-rate doctrine – ensuring that all rate-related information is public in order to "promote[] certainty in the market, discourage[] undesirable price discrimination, and preserve[] the regulator's authority to determine at the threshold whether particular rates or practices are unlawful." *Consolidated Edison Co.* v. *FERC*, 958 F.2d 429, 432 (D.C. Cir. 1992).

Because numerous power contracts contain options that affect rates and rate-related terms, the question raised is a significant one with wide-ranging application across the field of electrical regulation and, indeed, "across the spectrum of regulated utilities." *Arkla*, 453 U.S. at 577. In this period of deregulation, it is particularly critical that this Court ensure that FERC uphold the filed-rate doctrine, as embodied in 16 U.S.C. § 824d and in such cases as *Arkla* and *Central Office Telephone*. Accordingly, the Court should grant Norwood's petition for certiorari and reject the Commission's attempts to abandon the filed-rate obligations placed on it by its governing statute and this Court's precedents.

ARGUMENT

1. The opposition briefs do not dispute that the exercising of the option to extend the power contract at issue for ten years constituted a contract between Norwood and NEPCO. Instead, they maintain that the filing of the original contract containing the *option* to extend fulfilled all filing requirements not only for the original contract, but also for the new contract

created when Norwood exercised the option. According to FERC and NEPCO, the Commission is free to ignore the filing requirements under 16 U.S.C. § 824d and its accompanying regulation, 18 C.F.R. § 35.1, for *any* contracts exercising a previously filed option. This claim, and its application in this case, is flatly inconsistent with this Court's decision in *Arkla*.

In *Arkla*, this Court concluded that a customer could not enforce a "favored nations" clause that was included in a contract on file with, and approved by, the Commission. 453 U.S. at 582. In rejecting enforcement of that clause despite its presence in an approved agreement, the Court made clear that "where there is a conflict between the filed rate and the contract rate, the filed rate controls." *Id.*

FERC asserts that *Arkla* is not on point here, because there the contract "require[d] the utility to replace the filed rate with a new, but unspecified rate," while here "the Commission approved petitioner's option to extend the contract termination date in 10-year increments when it accepted the 1989 contract amendment," FERC Opp. at 8. See *id.* at 9 ("the Commission's approval of the 1989 contract amendment constituted approval of the optional contract extension"). This is no distinction at all. In *Arkla*, as here, the Commission approved and had on file a contract that recognized the possibility (not a certainty) that a critical term of the contract might change – in *Arkla*, the rate, and here, the duration. And, despite the fact that the filed, approved contract acknowledged such a possibility in *Arkla*, this Court held that the *implementation* of the most-favored nations clause had to be filed to be enforced. Similarly here, although the filed contract contained an option for its extension, the exercising of that option constituted a new contract that had to be filed to be enforced. The Commission's approval of a contract containing an option does not constitute approval of the

option's exercise, and, most certainly, does not constitute the filing of the new contract created by exercise of the option.[1]

At the heart of FERC's argument is its belief that rates per se are more important than rate-related items such as the duration of the agreement, for this is the only true distinction between *Arkla* and the instant case – that the option in the former directly affected rates while the option here pertains to contract length. But that argument is, as FERC recognizes (Opp. at 9), precluded by *Central Office Telephone* and thus cannot be openly stated. Both the First Circuit and the Commission contravened *Arkla* by giving effect to an unfiled contract that altered a central term of the filed rate. See also Petition at 11-12 (describing lower court decisions making clear that when a filed contract contains either "favored nations" or price escalation clauses, changes pursuant to such provisions must be filed to be enforced).

2. The opposition briefs' arguments, like the decisions below, simply blur the established distinction between automatic rate changes, which generally do not require a new filing to be effective, and exercises of options, which are not automatic and thus do require a filing to be effective. Petition at 15. Far from responding to this claim, the Commission and NEPCO attempt to justify the First Circuit's decision by further confusing the issue. See FERC Opp. at 10 (citing use of rate formula);[2] NEPCO Opp. at 11 (citing market-based

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[1] While the "Act" vindicated in *Arkla* was the Natural Gas Act, *Arkla* makes clear that its principles are equally applicable to cases arising under the Federal Power Act. 453 U.S. at 577 n.7.

[2] *Towns of Concord & Wellesley, Mass.* v. *FERC*, cited by FERC, is particularly inapposite, for it addresses a contract with an automatic adjustment clause expressly authorized under 16 U.S.C. § 824d(f). 844 F.2d 891, 896 (1st Cir. 1988); *see also Transwestern Pipeline Co.* v. *FERC*, 897 F.2d 570, 573 (D.C. Cir. 1990) (addressing FERC regulations dealing with pipelines' abilities to pass on costs to customers under the Natural Gas Act). Beyond setting forth procedural requirements that

rates). However, the distinction between automatic and non-automatic rate and rate-related changes is a crucial one. To be sure, a customer reviewing its utility's files could determine whether automatic rate changes have been triggered, but that customer would have no way of knowing whether an option has been exercised unless the filing requirement is consistently applied to options.

At no point does either opposition brief challenge the logic of this distinction. Rather, NEPCO complains that a decision reversing the First Circuit would endanger its ability to enforce a wide range of options without having to file option exercises. .NEPCO Opp. at 9-11. But this merely begs the question and illustrates the widespread nature of the problem at issue – and the importance of deciding now, in this case, whether public utilities will be permitted to effect expansive changes to their filed rates without following the filing requirements found in § 824d.

FERC dismisses the lower court decisions cited by Norwood in its Petition as old and "to the same effect as *Arkla*." FERC Opp. at 8 n.3. Norwood agrees; these cases reflect an old, well-established rule that even where a filed, approved contract contains provisions that recognize the possibility of altered rates and rate-related terms in the future, such alterations must be filed to be enforced. The application of that rule would have required the filing of the contract extension at issue here. The Commission also attempts to distinguish the remaining case, *Episcopal Theological Seminary* v. *FPC*, 269 F.2d 228 (D.C. Cir. 1959), because it

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must be met for such automatic rate adjustments, *see* 16 U.S.C. § 824d(f)(1)-(3), § 824d(f) specifically limits the term "'automatic adjustment clause'" to "a provision of a rate schedule which provides for increases or decreases (or both), without prior hearing, in rates *reflecting increases or decreases (or both) in costs* incurred by an electric utility," *id.* § 824d(f)(4) (emphasis supplied). Thus, § 824d(f) does not apply to this case.

"upheld application of a Federal Power Commission regulation under which every rate change was deemed to be a change in the rate schedule, which required refiling." FERC Opp. at 8 n.3. But that regulation is entirely consistent with the filed-rate doctrine, which requires the filing of rates and rate-related terms, while the decision under review – allowing enforcement of unfiled changes to the duration of a rate – is flatly contrary to the doctrine.[3]

In sum, Norwood agrees that when a filed, approved contract provides for automatic rate and rate-related adjustments, no new filing is required when such an adjustment occurs. But where, as here, a filed, approved contract simply creates an rate or rate-related option that may or may not be exercised, the implementation of the option must be filed in order to be enforced. FERC's contrary argument effectively assumes that there is a category of changes that alter the terms and conditions of the filed rate but nonetheless need not be filed. That core assumption, upheld by the First Circuit in this case, contradicts and undermines this Court's precedents and the filed-rate doctrine.

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[3] In an argument unsupported by FERC, NEPCO argues in the alternative that a change in a utility contract instituted unilaterally by a customer is per se outside of the reach of the filed rate doctrine. NEPCO Opp. at 4-5, 10. This argument is plainly baseless for several reasons. First, the change at issue here was not unilateral; it was the product of a contract between the customer and the utility and thus well within the coverage of the filed-rate doctrine. *See* Petition at 10. In any event, the argument is in substantial tension with both *Arkla*, where a *customer* sought to enforce a provision of its filed contract, 453 U.S. at 573-74, and the language of § 824d. Further, it lacks any logical stopping point and could ultimately permit the Commission to dispense with filing obligations for all aspects of electrical service after a public utility and customer have filed an initial contract. The court below did not rule on this ground; the government does not embrace it; it lacks merit; and it should not be decided in this case.

3. Contrary to NEPCO's suggestion, this case implicates the principles protected by this Court's filed-rate doctrine decisions. As this Court's jurisprudence makes clear, the filed-rate doctrine promotes certainty for purchasers of regulated services and products, such as electrical power; ensures that customers can review the Commission's files and determine the terms under which those services and products are being provided; and protects against discrimination. See Petition at 14, 16. The decision at issue in this petition undermines each of these salutary principles. *Arkla, Central Office Telephone*, and *Maislin Industries, U.S., Inc.* v. *Primary Steel, Inc.*, 497 U.S. 116, 130 (1990) drew a bright line: purchasers and end users are entitled to rely *solely* on the contracts that are on file with the Commission. By giving effect to a secret, unfiled agreement, the First Circuit blurred that bright line, causing uncertainty for purchasers, like Norwood, and for customers and other persons who review FERC's files in order to ascertain the terms under which a distributor receives electrical power service.

FERC effectively concedes that the purposes of the filed-rate doctrine mandate that the public be able to determine the duration of a power contract from the filed contract. It nonetheless makes two arguments that the petition should not be granted.

First, the Commission contends that this case would be a poor vehicle to address the question presented, because the public "at all times" could have deduced from the absence of a termination notice in the file that the parties had decided to extend the contract. FERC Opp. at 10.[4] This argument is demonstrably wrong, and ironically so. There is a clear end date on the 1983 Contract – October 31, 1998; and on file with FERC is a contract between Norwood and a *second*

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[4] Notably, neither FERC nor the court of appeals made such a finding in their opinions in this case.

utility pursuant to which the latter is providing electrical power service to Norwood. In fact, the contract extension is not in effect, and the contract at issue has been terminated.

Indeed, by permitting NEPCO to decide which unfiled document it will enforce – the 1990 Letter exercising the option or the notice of termination (and withdrawal of the 1990 Letter) – the decision below opens the door to discrimination. NEPCO decided to try to enforce the unfiled 1990 Letter, but it could just as easily instead have filed the notice of termination, without bringing the 1990 Letter to the attention of the Commission.[5] Thus, pursuant to the decisions under review, public utilities, like NEPCO, have discretion to treat similarly situated purchasers differently – the essence of unlawful discrimination. *Central Office Telephone*, 524 U.S. at 223.[6]

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[5] In light of the current deregulation of the energy field, one could easily envision such differential treatment being accorded to a producer-parent's distributor-affiliate.

[6] Indeed, it is undisputed that Norwood has given NEPCO written notice of termination (with a withdrawal of the 1990 Letter). Thus, FERC's contention – that the notice is not in the file – simply demonstrates that the Commission has permitted NEPCO to fail to file *two* documents "affect[ing] or relat[ing] to [the] rates, charges, classifications, and services," 16 U.S.C. § 824d(c), under the 1983 Contract – violations of the statute and the filed rate doctrine that have inured entirely to the benefit of NEPCO and to the detriment of Norwood. FERC's position further illustrates the risks inherent in permitting it to pick and choose what contracts it will or will not enforce without filing pursuant to § 824d. Under the Commission's argument, an unfiled notice of termination is ineffective – even if the distributor seeking to terminate has faithfully followed the filed contract's requirements for termination. *See id.* § 824d (requiring "public utilit[ies]" to file contracts and not providing means for distributor to file such contracts); 18 C.F.R. § 35.1 (same). Yet in this case the Commission deemed effective an unfiled notice of extension. This disparate treatment, and the enormous advantage that it provides to producers like NEPCO, unjustifiably does serious harm to the filed-rate requirements of § 824d.

Second, FERC argues that "there always have been 'gaps in what could be gleaned from Commission filings.'" FERC Opp. at 10 (citing Pet. App. 9a-10a). But in support of that argument FERC cites two cases in which courts of appeals held that contracts expressly providing for future occurrences (*i.e.*, termination as of a particular date and a rate adjustment pursuant to a formula) could be enforced. The cases, and hence the Commission's argument have no application where, as here, the contract contains an *option.*

In short, this case provides a particularly clear factual situation against which to assess the question presented. Neither the Commission nor NEPCO challenges the fact that the July 25, 1990 letter by which Norwood sought to exercise an option to extend the term of its 1983 electrical service contract with NEPCO was a contract under generally applicable contract law. And all parties agree that the 1990 Letter, by purporting to extend the term of the 1983 Contract, is a "contract[] which in any manner affect[s] or relate[s] to [the] rates, charges, classifications, and services," 16 U.S.C. § 824d, provided by NEPCO to Norwood under the 1983 Contract. Finally, it is likewise undisputed that NEPCO failed to file the 1990 Letter,[7] but the Commission nevertheless gave effect to that unfiled document and permitted NEPCO to extend the 1983 Contract and reap millions of dollars in profits from Norwood for electrical power that NEPCO will never provide.

These undisputed facts present a purely legal question for this Court's resolution – to wit, whether the Commission, having permitted the filing of a contract authorizing an option,

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[7] NEPCO attempts to argue away its failure to file by stating that it did not need to file the 1990 Letter until 60 days before it became "effective" on November 1, 1998. NEPCO Opp. at 11 n.8. Beyond the fact that the 1990 Letter has never been filed, *see* FERC Opp. at 9-10, this argument ignores the fact that NEPCO sought a determination, granted by FERC, that the 1990 Letter was *binding* on Norwood.

can authorize enforcement of an unfiled document exercising that option.

* * * *

Both Norwood and FERC have highlighted the fact that the electrical industry is currently undergoing deregulation. See Petition at 16; FERC Opp. at 10 n.4. This is indeed a critical time in the electrical industry. Permitting public utilities to evade their filing requirements at this time puts at risk the interests of electric power distributors and end-use consumers alike. The filed-rate doctrine has historically ensured that consumers and agencies have the information necessary to protect the public interests, to avoid discrimination, and to vindicate the federal statutes that agencies enforce. This Court should act now to ensure that the filed-rate doctrine retains its strength and vitality in the face of the contrary agency and lower court decisions below.

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

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